TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 306.

OZIAS W. SHIPMAN, PLAINTIFF IN ERROR,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED SEPTEMBER 28, 1891.

(14,866.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 16, 1894.

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1 At a stated term of the circuit court of the United States of America within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Columbus, Ohio, on the first Tuesday of December, being also the third day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth—present, the Honorable H. B. Brown, district judge of the eastern district of Michigan—among the proceedings had were the following, to wit:

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

Be it remembered that heretofore, to wit, on the 7th day of December, in the year of our Lord one thousand eight hundred and eighty-three, there was filed in the clerk's office of said court the following transcript from the court of Franklin county common pleas. Said transcript is in the words and figures following, to wit:

Court of Common Pleas, Franklin County, Ohio.

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

2 *Petition.*

The Straitsville Central Mining Company, a corporation organized under the laws of Ohio, located, doing business, and having its principal office in the county of Franklin, within said State, plaintiff, says that there is due to it from Ozias W. Shipman, defendant, upon an account for goods sold and delivered, a true copy whereof, with all credits and endorsements thereon, is hereto annexed, the sum of nineteen thousand five hundred and sixty-four and $\frac{80}{100}$ dollars, with interest from June 18, 1880, for which, with costs, said plaintiff prays judgment against said defendant.

THE STRAITSVILLE CENTRAL
MINING COMPANY, *Plaint.*,
By J. T. HOLMES, *Its Attorney.*

THE STATE OF OHIO, *Franklin County,* } *ss*:

Joseph A. Jeffrey, being first duly sworn, says that he is the secretary and treasurer of The Straitsville Central Mining Company, plaintiff, duly authorized in the premises; that the allegations contained in said plaintiff's foregoing petition are true, as he verily believes.

JOSEPH A. JEFFREY.

Sworn to before me and subscribed in my presence by said Joseph A. Jeffrey this 21st day of June, 1880.

JOHN F. McFADDEN,
Notary Public. [SEAL.]

3 To the clerk:

Issue summons, order of attachment, and garnishee process to the sheriff of Franklin county, Ohio, returnable according to law. Indorse amount claimed, $19,565.80, and interest from June 18, 1880.

J. T. HOLMES,
Attorney for Plaintiff.

4 No. 1.

Ozias W. Shipman in acc't with Straitsville Central Mining Co.

1878.				
April 30.	To coal, 300 tons lump, $2.95	885 00		
	396 " nut, 2.35	930 60		
			1,815 60	
	Less freight paid on same, @ 2.25 per ton		1,566 00	
				1,249 60
May 31.	To coal, 12 tons nut, prep. Toledo, $1.95	23 40		
	528 tons nut, collect Detroit, 2.30	1,214 40		
	1,008 tons lump, collect Detroit, 2.95	2,973 60		
	12 tons lump, collect Toledo, .80	9 60		
			4,221 00	
	Less fr't paid on 1,536 tons to Detroit, @ 2.25	3,456		
	" rebate on 24 tons slack to Detroit, .20	4 80		
			3,460 80	
				760 20
June 29.	To coal, 396 tons nut, Detroit, 2.20	871 20		
	12 " " Toledo, .15	1 80		
	852 " lump, f. o. b. cars Detroit, 2.85	2,428 20		
			3,301 20	
	Less fr't paid on 1,248 tons to Detroit, 2.25		2,808 00	
				493 20
July 31.	To coal, 624 tons lump on cars, Detroit, 2.85	1,778 40		
	456 tons nut on cars, Detroit, 2.20	1,003 20		
	24 tons slack on cars, Detroit, 0.00	0 00		
			2,781 60	
	Less fr't paid on 1,080 tons, Detroit, 2.25	2,430 00		
	" rebate on 24 tons slack, .20	4 80		
			2,434 80	
				346 80
Aug. 31.	To coal, 1,030 tons lump, Detroit, 2.85	2,935 50		
	12 " slack, " 0.	0 00		
	708 " nut, " 2.20	1,557 60		
			4,493 10	
	Less fr't paid on 1,738 tons, 2.25	3,910 50		
	" rebate on 12 tons slack, .20	2 40		
			3,912 90	
				580 20

Sept.	30.	To coal, 872 tons lump, Detroit, 2.85....	2,485 20		
		372 " nut, " 2.20....	818 40		
				3,303 60	
		Less fr't on 1,244 tons, @ 2.25.....		2,799 00	
					504 60
"	26.	To coal, 60 tons lump (billed to C. S. R'y in June), 2.85.....		171 00	
		Less fr't paid on same.....		135 00	
					36 00
Oct.	31.	To coal, 12 tons slack, 0.	0 00		
		636 " nut, Detroit, 2.20....	1,399 20		
		1,834 " lump, " 2.85....	5,226 90		
				6,626 10	
		Less fr't paid on 2,470 tons, @ 2.25.....	5,557 50		
		" rebate " 12 " slack, .20...	2 40		
				5,559 90	
					1,066 20
					4,036 80

5

Cr.

May	21.	By bal. of check, 405.80, after paying land Co. Apr. %.....		229 80	
June	13.	" cash.....		738 00	
July	18.	" acceptance.....		381 61	
		" " extra rebate, 5c. pe ton on 1,536 tons in May		76 80	
Aug.	14.	" acceptance.....		346 80	
Sept.	14.	" "		580 20	
Oct.	12.	" "		504 60	
					2,857 80
		Bal. due S. C. M. Co., per st'm't Nov. 1, 1878.....			1,179 00
Nov.	30.	To coal, 24 tons slack, 0.	0 00		
		696 " nut, .15.....	104 40		
		1,294 " lump, .80.....	1,035 20		
				1,139 60	
		To fr't on car to Perry, 19.20; to Taylor, 19.20; net.....		38 40	
		" fr't on car 354 to Detroit, net.....		24 60	
				1,202 60	
		Less rebate on 1,978 tons, @ 20c..		395 60	
					807 00
		Balance forward.....			1,986 00

6

1878.		To bal. for'd.....			1,986 00
Dec.	31.	To coal, 120 tons slack, 0.....	0 0		
		84 " nut (bo't for him), 30c.	25 20		
		300 " " 25c.	75 00		
		552 " " .15..	82 80		
		1,992 " lump, .80..	1,593 60		
		"	1,776 60		
		" net fr't on car to Taylor.....	19 20		
				1,795 80	
Dec.	31.	Less rebate on 3,036 tons, @ 20c.....		607 20	
					1,188 60
1879.					
Jan.	31.	To coal, 12 tons slack, 00.....	0 00		
		648 " nut, .15.....	97 20		
		156 " " .25.....	39 00		
		144 " " .30....	43 20		
		2,160 " lump, .80.....	1,728 00		
				1,907 40	
		Less rebate on 3,120 tons, @ 20c.....		624 00	
					1,283 40

Feb.	28.	To coal, 12 tons slack, 0		0 00		
		376 " nut (contract), .15		86 40		
		312 " " .25		78 00		
		2,712 " lump, .80		2,169 60		
					2,334 00	
		Less rebate on 3,612 tons, @ 20c			722 40	
						1,611 60
Mar.	31.	To coal, 552 tons nut, @ 15c		82 80		
		1,860 " lump, " .80		1,488 00		
					1,570 80	
		" fr't on 24 " to Ann Arbor			61 20	
					1,632 00	
		Less rebate on 2,388 tons, 20c			477 60	
						1,154 40
Apr.	30.	To coal, 84 tons nut, 35c		29 40		
		12 " " .30		3 60		
		300 " " .25		75 00		
		60 " " .15		9 00		
		1,030 " lump, .75		772 50		
					889 50	
		228 tons, @ 25		57 00		
		Less rebate on 1,258 tons, @ .30		377 40		
					434 40	
						455 10
May	31.	To coal, 386 tons nut, .20		77 20		
		13 " slack, .0		0 00		
		680 " lump, .75		510 00		
		60 " " .70 M. C. R'y.		42 00		
		24 " " .75 Ann Ar.		18 00		
7		Net fr't on Ann Arbor coal		57 60		
					704 80	
		200 tons f. o. b. Toledo, 2.25			450 00	
					1,154 80	
		Less rebate on 1,066 tons, @ 35c		373 10		
		" " " 60 " " .45 M. C. R'y.		27 00		
					400 10	
						754 70
June	30.	To coal, 533 tons nut, .20		106 60		
		13 " slack, .0		0 00		
		1,364 " lump, .70		954 80		
					1,061 40	
		Less rebate on 13 tons Ypsilanti, @ .15.		1 95		
		435 " Detroit, .35.		502 25		
		445 " " .40.		178 00		
					682 20	
					379 20	
		277 tons f. o. b. Toledo, 2.20		609 40		
		Wheeling on Vulcan		15 00		
					624 40	
						1,003 60
						9,437 40

1878.		Cr.		
Dec.	5.	By cash	700 00	
1879.		" accpt. 30 da	366 20	
Jan.	24.	" cash	700 00	
	"	" accpt. 1 mo	488 60	
Mar.	7.	" cash	683 40	
	"	" acceptes. 400 & 200	600 00	
				3,538 20
		To bal. for'd		5,899 20

8 No. 2.

1879.		To bal. forward sheet No. 1			5,899 20
Apr.	2.	By cash		1,000 00	
	5.	" " of Canada Southern R'y		521 59	
May	26.	" accept. 30 days, 300; 40 days, 300		600 00	
June	30.	" reduction for shortage, &c		12 09	
					2,133 68
		Bal. as per statement rendered			3,765 52
July	10.	By cash		600 00	
	11.	" acceptes		1,500 00	
	31.	" cash		700 00	
					2,800 00
					965 52
July	31.	To coal at Toledo, 1,831 tons lump, 2.15,	3,937 05		
		26½ " coal extra, .70,	18 55		
		104 " nut, 1.70	176 80		
				4,132 40	
		204 tons lump, D. S. & N. R'y, @ .70	142 80		
		195 " nut, E. I. Co., .20	39 00		
		788 " lump, " " .75	591 00		
		52 " slack, O. W. S., gen'l acc't	2 00		
		1,106 " nut, " " .20	221 20		
		1,257 " lump, " " .70	879 90	(½ T. er.)	
			1,875 90		
		"Less:"			
		Rebates, 1,196 tons lump, Detroit.			
		1,106 " nut, "			
		973 " E. I. Co.			
		196 " D. L. N. R'y.			
		3,471 " @ .55	1,909 05		
		13 " Ypsilanti, .15	1 95		
			1,911 00		
		Due O. W. S. on rail shipments		35 10	
		Bal. on July %			4,097 30
					5,062 82
			1,094 80		
Aug.	7.	By acceptes. Muir Bros., disc't & col	18 86		
				1,075 94	
"	18.	"cash		1,800 00	
			1,145 66		
"	"	"note Baugh Forge Co., disc't & col	40 00		
				1,105 66	
"	"	"cash on % E. I. Co		257 43	
"	30.	"am't paid Champion & Co., bill filed		266 50	
					4,505 53
					557 29
9		To coal:			
Aug.	30.	832 tons nut, O. W. S., 20c	166 40		
		1,218 " lump, " " " 70c	852 60		
		78 " nut, E. I. Co., .20	15 60		
		1,323 " lump, " .75	992 25	(see er. 9–4)	
				2,026 85	

	By rebate on 3,331 tons @ 55c., Det...	1,832 05		
	" " " 26 " " 25c., Ann. Ar.	9 10		
			1,841 15	
			185 70	
	By " " 39 tons Grand Rapids, July, @ .25		9 75	
				175 95
	Bal. forward			733 24
10	To balance for'd			733 24
1879.				
Aug. 20.	To coal at Toledo:			
	3,881.982 tons lump, f. o. b., 2.10	8,151 12		
	48.225 " " extra, .70	33 70		
	39 " nut, 1.65	64 35		
	Loading W. A. Moore, Aug. 27	8 20		
			8,257 37	
				8,257 37
				8,990 61
Sept. 4.	To bal. due on E. I. Co. %	649 61		
	Less overcharge July 15, 30 weight	26 78		
			622 83	
	Add am't rebate ch'g'd back by C. & H. V., July, 156.31; credit at 55c., collected 35c., 311 tons, @ .20		62 20	
			685 03	
	Less rebate on fr't, June 28 to July 15, 849 tons, @ .35		297 15	
				387 88
				9,378 49
	" By 5c. per ton overcharge on 1,323 tons, E. I. C., Aug.		66 15	
11.	" accpts. 500 & 500		1,000 00	
16.	" "		317 57	
	" cash		1,400 00	
		4,405 90		
	" note Baugh S. Forge Co., ½ dis. & col.	53 43		
			4,352 47	
				7,136 19
	Balance			2,242 30
30.	To coal, 938 tons nut (O. W. S.), .20	187 60		
	1,148 " lump " .70	803 60		
	1,443 " " E. I. Co. .70	1,010 10		
	For'd, Toledo, 94½ tons lump, E. I. Co., 70c	66 15		
			2,067 45	
	Rebates:			
	3,328 tons from mines to Detroit.			
	91 " " Toledo " "			
	3,419 " " @ 55c	1,880 45		
	52 " to Grand Rapids, .25	13 00		
			1,893 45	
			174 00	
	O. W. S. E. J. Co.			
	Deduct cars, 1,202 2/29 & 3,526 3/10 on back, 29 tons, 2.70		20 30	
				153 70

	Coal at Toledo:				
	1,072 tons, f. o. b., 2.10			2,253 30	
	4 " extra, .70			28 70	
	Wheeling on "Torrent"			3 50	
					2,285 50
					4,681 50
			1,656 73		
Oct.	25. By note Baugh Forge Co., ½ dis. & col.		20 08		
					1,636 65
11					
	Balance				3,044 85
Oct.	31. To coal, 1,102 tons nut, Det., .25		275 50		
	492½ " lump, " .90		443 25		
	1,003 " lump, " 1.00		1,003 00		
	13 " nut, " .25		3 25		
				1,725 00	
	To balance forward			1,725 00	3,044 85
12		No. 3.			
1879.				Oct. bill.	
Oct.	31. To bal. forward			1,725 00	3,044 85
	" coal, 434 tons lump (E. J. Co.), 80c.		347 20		
	" " 444² " " 90 .		400 05		
				747 45	
	" " 444 " " (D.L. & N.R'y) "			399 60	
	" " 451² " " D. & B. C. R'y, "			406 35	
	" " 202½ " lump, for'd from Toledo, .90			182 25	
	" fr't paid on coal, " " " @ 1.75			341 25	
	1,572 tons f. o. b. vessels at Toledo, 2.25			3,537 00	
	60 " coal, extra, .80			48 00	
				7,386 70	
		CREDITS.			
	Rebate on 3,191 tons to Detroit, @ 53c.		1,755 05		
	Rebate on 80 tons to Grand Rapids, .25		20 00		
	Overcharge by C., H. V. & L., D. & M. S. R. R's on coal for'd from Toledo		26 00		
	Rebate on 195 tons, at 55c		107 25		
				1,908 30	
					5,478 40
					8,523 25
Nov.	22. By cash			331 30	
	29. " note Baugh, Forge Co., ½ dis. & col		1,744 21 21 57		
				1,722 64	
					2,053 94
	Bal.				6,469 31
	29. To coal:				
	78 tons nut to Detroit, &c., 50c. (10th to 29th)		39 00		
	638½ tons lump to Detroit, &c., 1.75 (10th to 29th)		1,117 37		
	353 tons lump to Detroit, &c., 1.25 (1st to 10th)		441 25		
	221 tons nut, to Detroit, &c., .40 (1st to 10th)		88 40		
	283 tons lump to E. I. Co., 1.55 (1st to 10th)		382 73		

	747² tons lump to E. I. Co., 1.75 (10 to 29)	1,308 12		
	135 tons lump to D. S. & M. R'y, 1.15	155 25		
	135 " " " D. & B. C. R'y, 1.15	155 25		
	182 " " " f. o. b. vessels, Toledo, 2.60	473 20		
			4,160 57	

13 CR.

	By rebate on coal to D. S. & N. & D. & B. C. R'y in Oct. (this was made to include Nov. shipments, but C. & H. V. did not allow claim), 729 tons, @ 55c		400 95	3,759 62
				10,222 93
Dec. 10.	By cash		1,000 00	
" "	" accpts		1,500 00	
24.	" cash		1,000 00	3,500 00
				6,728 93
31.	To car 4267, Nov. 14, 13 tons lump, 1.35			17 55
				5,746 48
"	By c'r 4192, ch'g'd Oct. 22, also Nov. 13, 13 tons nut, .40			5 20
	To balance forward			6,741 28

14

1879.	To balance forward			6,741 28
Dec. 31.	To coal, as per stat's rendered:			
	914 tons f. o. b. vessels Toledo, 2.65	2,422 10		
	1,406 " to Eureka Iron Co., 1.30	1,827 80		
	2,790 " lump, O. W. Shipman & Co., Detroit, 1.30	3,627 00		
	824 tons nut, O. W. Shipman & Co., Detroit, .50	412 00		
			8,288 90	
	Deduct 65 tons, @ 1.30, charged Shipman instead of Toledo & Ann Arbor R'y		84 50	8,204 40
	Balance			14,945 68
Dec. 31.	By C. B. Pfahler, bill paid		13 18	
1880.				
Jan. 24.	" cash		2,000 00	
" "	" our dr'ft paid		1,500 00	3,513 18
	Balance			11,432 50
" 31.	To coal, as per stat'm's rendered:			
	78 tons slack		00 00	
	182 " " 14 cars, @ .75		10 50	
	143 " nut, charged as slack, .15		8 25	
	827 " " 40c		335 80	
	1,313 " lump, 1.30		1,706 90	
	1,310 " " 1.25		1,637 50	
	926 " " to Eureka Iron Co., 1.30		1,203 80	
	926 " " " " 1.25		1,157 50	
				6,055 25
	Balance			17,487 75

Feb.	28.	To coal, as per st'm'ts rend.:		
		793 tons nut	396 50	
		2,261 " lump to Shipman & others on his order, 1.25	2,826 25	
		3,191 tons lump to Eureka Iron Co. on his order, 1.25	3,988 75	
			7,211 50	
		Less car 4438, Feb. 17, 13 tons, @ 1.25, billed wrong	16 25	
				7,195 25
		Balance		24,683 00
Mar.	11.	By cash		3,000 00
		Balance		21,683 00
15				
Mar.	31.	To coal, as per st'm't rendered:		
		338 tons nut coal, .50	169 00	
		1,892 " lump " to Shipman & others on his order, 1.20	2,270 40	
		Eureka Iron Co., on his order, 1.20	48 40	
			2,657 80	
		Less car 3543, Mar. 1, billed wrong, 13 tons, @ 1.20	15 60	
				2,642 20
				24,325 20
Apr.	9.	By cash of C. & H. V. R. R., by his order for sundry rebates	12,454 85	
	22.	By our draft paid	1,500 00	
				13,954 85
		To bal. for'd		10,370 35
16				
1880.		To balance forward		10,370 35
April	30.	To coal, as per st'm't rendered:		
		879 tons nut to Shipman & others on his order, .50	439 50	
		2,838 tons lump to Shipman & others on his order, 1.20	3,405 60	
		249 tons lump, Eureka Iron Co., on his order, 1.20	298 80	
				4,143 90
				14,514 25
May	17.	By cash	1,500 00	1,500 00
				13,014 25
May	31.	To coal, as per st'm't rendered:		
		565 tons nut to Shipman & others on his order, .50	282 50	
		3,400 tons lump to Shipman & others on his order, 1.20	4,080 00	
				4,362 50
		1,739 tons lump, f. o. b. vessels at Toledo, 2.80		4,869 20
		69 " nut, " " " 2.10		144 90
				22,390 85

June 2.	By cash of C. & H. V. R. R. on rebates paid us by his order	6,541 45	
11.	By acceptes. 30, 60, & 90 days, 1,000 each	3,000 00	
			9,541 45
	Balance due S. C. M. Co.		12,849 40
June 18.	To coal:		
	5,282 tons lump to Shipman & others on his order, @ 1.20		6,338 40
	654 " nut, .50		377 00
	Balance due Straits. Cent. M. Co.		$19,564 80
	[In pencil:]		6,715 40

17 Court of Common Pleas, Franklin County, Ohio.

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

Affidavit.

THE STATE OF OHIO, *Franklin County*, } ss:

Joseph A. Jeffrey, of lawful age, being first duly sworn, says that he is the secretary and treasurer of The Straitsville Central Mining Company, a corporation organized under the laws of Ohio, located, doing business, and having its principal office in the county of Franklin, within said State, plaintiff, duly authorized in the premises; that said plaintiff has commenced an action in said court of common pleas within said county of Franklin and State of Ohio against said Ozias W. Shipman, defendant, to recover said sum of nineteen thousand five hundred and sixty-four and $\frac{80}{100}$ dollars, with interest thereon from the 18th day of June, A. D. 1880, now due and payable to said plaintiff from said defendant on an account for goods sold and delivered by said plaintiff to said defendant before said date; that said claim of plaintiff against said defendant is just, and that there is now justly due from said defendant to said plaintiff the sum aforesaid, with interest aforesaid from the date aforesaid; that said plaintiff ought, as this affiant believes,

18 to recover thereon against said defendant said sum of nineteen thousand five hundred and sixty-four and $\frac{80}{100}$ dollars, with interest from the 18 day of June, A. D. 1880, and that said defendant is a non-resident of the State of Ohio.

Affiant further says that he has good reason to believe and does believe that the Columbus and Hocking Valley Railroad Co., a corporation organized under the laws of Ohio, located, doing business, and having its principal office in the city of Columbus, within the county of Franklin and State of Ohio, and the Baltimore and Ohio Railroad Company, a corporation organized under the laws of the State of Maryland, located, doing business, and having an office in said city, in the said county of Franklin and State of Ohio, under the laws of said latter State, have property of said defendant in

their possession, to wit, moneys due and to become due upon claims of said defendant against it liable to be attached in this action; and further says not.

JOSEPH A. JEFFREY.

Sworn to before me and subscribed in my presence by said Joseph A. Jeffrey this 21st day of June, A. D. 1880.

JOHN F. McFADDEN,
Notary Public. [SEAL.]

(Endorsed on cover:) The court of com. pleas of Franklin county, O. The Straitsville Cen. Min. Co. *vs.* Ozias W. Shipman. 12757. Petition & affidavit for attachment. Filed June 21, 1880. Harvey Cashatt, clerk; Theo. Beck, dep'y. J. T. Holmes, for plaintiff.

19 Court of Common Pleas, Franklin County, Ohio.

Appearance Docket No. —, page 466.

STRAITSVILLE CENT. MIN. COMPANY
vs.
OZIAS W. SHIPMAN. } No. 12757.

To said court of common pleas:

Your petitioner, Ozias W. Shipman, respectfully shows to the honorable court that the matter in dispute and amount claimed by the plaintiff in this suit, exclusive of costs, exceeds *of* the sum of five hundred dollars; that the only controversy in this suit is one wholly between citizens of different States and which can be determined between them; the suit is brought to recover a debt claimed to be due from the defendant to the plaintiff. The plaintiff in its petition alleges and claims that the defendant is indebted to it on an account for goods sold and delivered in the sum of nineteen thousand five hundred and sixty-four dollars and eighty cents and prays judgment against the defendant for that amount, with interest from June 18, 1880. Said defendant, Ozias W. Shipman, denies that he is indebted to said plaintiff or that there is due from him to said plaintiff said sum of money or any part thereof, and the only controversy in the cause is whether the said defendant, Ozias W. Shipman, is so liable or indebted to the plaintiff.

20 Said defendant, Ozias W. Shipman, is now and at the time of the commencement of this suit was a citizen of the State of Michigan. The plaintiff is a corporation organized under the laws of Ohio, located, doing business, and having its principal office within said State of Ohio, and its stockholders are residents of said State of Ohio and of the States of Connecticut, Mass., and Missouri. None of said stockholders are residents of said State of Michigan.

That your petitioner desires to remove this case into the circuit court of the United States in and for the southern district of Ohio, eastern division, and that your petitioner herewith files his bond with sufficient surety that he will enter in the said circuit court, on or before the first day of its next session, a copy of the record in

this suit, and that he will pay all the costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, in accordance with the act of Congress of the United States of America in such case made and provided.

Wherefore your petitioner prays that such removal be allowed by your honorable court, &c.

STATE OF OHIO, }
Franklin County, } *ss:*

Ozias W. Shipman, being duly sworn, deposes and says that the facts stated in his foregoing petition are true.

O. W. SHIPMAN.

Sworn to and subscribed before me this 20th day of July, A. D. 1880.

JAS. F. HOFFMAN,
Notary Public, Franklin County, Ohio. [SEAL.]

21 (Endorsed on cover:) 12757. Court of com. pleas, Franklin county, Ohio. The Straitsville Cent. Min. Co. *vs.* Ozias W. Shipman. Petition of defendant for removal to the U. S. circuit court. Filed July 28, 1880. Harvet Cashatt, clerk, by Theo. H. Beck, deputy. De Will & Hoffman, R. C. Hoffman, and Maybury & Conelly, att'ys for defendant.

Court of Common Pleas, Franklin County, Ohio.

STRAITSVILLE CENTRAL MINING CO. }
vs. } No. 12757.
OZIAS W. SHIPMAN. }

Ozias W. Shipman, of the city of Detroit, in the State of Michigan, defendant in the above suit, and Joseph H. Somers, of the city of Columbus, Franklin county and State of Ohio, are hereby bound and indebted to the said plaintiff in the sum of one thousand dollars.

In witness whereof the said parties have hereto set their respective hands and seals this 20th day of July, anno Domini 1880.

The condition of this obligation is such that whereas said obligor has presented a petition to the honorable the judges of the court of common pleas of Franklin county, in the State of Ohio, for
22 the removal of the case mentioned at the *of the case mentioned at the* head of this obligation to the circuit court of the United States in and for the southern district of Ohio, eastern division:

Now, if the said obligor, defendant in said suit, shall on or before the first day of the next session of the said circuit court file and enter in the said circuit court a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by the said circuit court if said court shall hold that such suit is wrongfully or improperly removed thereto, and shall then duly enter his appearance

in said suit in the said circuit court, then this bond shall be void and of no effect; otherwise shall remain and be of full force.

Witness our hands and seals the day and year aforesaid.

O. W. SHIPMAN. [SEAL.]
J. H. SOMERS. [SEAL.]

STATE OF OHIO, }
Franklin County, } *ss:*

I, Joseph H. Somers, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the city of Columbus, in the county of Franklin and State of Ohio, and a property-holder in said State; that I am worth the sum of ten thousand dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution; that I have property in the southern district of Ohio, eastern division, liable to execution, of the value of more than ten thousand dollars.

J. H. SOMERS.

Sworn to and subscribed in my presence this 20th day of
23 July, A. D. 1880.

HARVEY CASHATT,
Clerk Fr. Court of Com. Pleas. [SEAL.]

(Endorsed on cover:) 12757. Court of com. pleas, Franklin county, Ohio. The Straitsville Cent. Min. Co. *v.* Ozias W. Shipman. Bond of defendant for removal to the U. S. circuit court. Filed July 28, 1880. Harvey Cashatt, clerk; Theo. H. Beck, deputy.

24 THE STATE OF OHIO, }
Franklin County. }

Court of Common Pleas.

THE STRAITSVILLE COAL AND MINING CO. }
vs. }
O. W. SHIPMAN *et al.* }

Answer of the Baltimore and Ohio Railroad Co., Garnishee.

Before me, the undersigned, clerk of the court of common pleas within and for the county and city of Baltimore, personally came Robert Garrett, who, being duly sworn according to law, says that he is the third vice-president of the Baltimore and Ohio R. R. Company aforesaid, garnishee in the above case; that said railroad company was organized as a corporation under the laws of the State of Maryland and is therefore a citizen of said State; and, further, *defendant* says that the said garnishee is not indebted to said defendant, O. W. Shipman, in any manner or form in any sum whatever and has no property of said defendant in its possession or under its control.

ROBERT GARRETT.

Sworn to before me and subscribed in my presence by Robert Garrett this twenty-seventh day of November, A. D. 1880.

J. FREEMAN RASIN, *Clerk.* [SEAL.]

Sworn to before me and subscribed by the said Robert Garrett in my presence on this 27th day of November, 1880.

Witness my hand and official seal on the day and year last aforesaid.

CARROLL SPRIGG, [SEAL.]
Comms. of State of Ohio in the State of Maryland.

25 Court of Common Pleas, Franklin County, Ohio, September Term (Dec. 6th), A. D. 1880.

THE STRAITSVILLE CEN. MIN. CO., Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

The above-named defendant, Ozias W. Shipman, having at the time of entering his appearance herein filed his petition in this action for the removal thereof into the circuit court of the United States for the southern district of Ohio, and having at the same time offered good and sufficient surety, according to statute, and made and filed with his said petition a bond in the penal sum of one thousand dollars, with J. H. Somers as surety, conditioned according to law: Therefore the court, finding that the facts stated in said petition are true, and that the above-named defendant is entitled to such removal, and that the surety in such bond is good and sufficient for the penal sum therein named, and that said bond is sufficient in amount and conditioned according to law, do hereby accept said petition, bond, and surety and order that the said cause and the record thereof be removed into said circuit court of the United States for the southern district of Ohio, sitting at the city of Columbus, Ohio, and all further proceedings in this court in the said cause are hereby stayed; to all which ruling and orders of the court said plaintiff excepts.

Costs in Franklin com. pleas court, $16.95, paid by the defendant Dec. 7, 1880.

HARVEY CASHATT, *Clerk.*
THEO. H. BECK, *Deputy.*

26 *Certificate to Common Pleas Record.*

THE STATE OF OHIO, } ss:
Franklin County, }

I, Harvey Cashatt, clerk of the court of common pleas within and for the county aforesaid and State of Ohio, and in whose custody the files, pleadings, journals, records, execution dockets, and seal of said court are required by the laws of said State to be kept, hereby certify that the foregoing is truly taken and copied from the

records and original pleadings of the proceedings of said court, and that the same is a correct transcript thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at the court-house, in the city of Columbus, in said county, this 7th day of December, A. D. 1880.

HARVEY CASHATT, *Clerk.* [SEAL.]

THE STATE OF OHIO, } *ss:*
Franklin County, }

I, Eli P. Evans, judge of the court of common pleas within and for said county, do hereby certify that Harvey Cashatt, who signs his name to the above certificate, was at the time of signing the same and now is clerk of said court, and that his attestation is in due form of law.

Witness my hand this — day of December, A. D. 1880.

ELI P. EVANS, *Judge.*

27 THE STATE OF OHIO, } *ss:*
Franklin County, }

I, Harvey Cashatt, clerk of the court of common pleas within and for said county, hereby certify that Eli P. Evans, who signs his name to the above certificate, was at the time of signing the same and now is a judge of the court of common pleas within and for said county, duly elected, commissioned, and sworn.

As witness my hand and the seal of said court, at Columbus, this 7th day of December, A. D. 1880.

HARVEY CASHATT, *Clerk.* [SEAL.]

Endorsed: I hereby acknowledge myself security for costs in within case. J. H. Somers.

28 And afterwards, to wit, on the 30th day of March, A. D. 1881, the following affidavit was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Circuit Court of the United States, Eastern Division, Southern District of Ohio.

THE STRAITSVILLE CEN. MINING CO., Plaintiff, }
against }
OZIAS W. SHIPMAN, Defendant. }

Affidavit for Attachment.

UNITED STATES OF AMERICA, } *ss:*
Eastern Division, Southern District of Ohio, }

Joseph A. Jeffret, of lawful age, being first duly sworn, says that he is the secretary and treasurer of the Straitsville Central Mining Company, a corporation organized under the laws of the State of Ohio, located, doing business, and having its principal office in the county of Franklin, within said State, plaintiff, duly authorized in the premises; that said plaintiff, on the 21st day of June, A. D. 1880, commenced an action in the court of common pleas, within said county of Franklin and State of Ohio, against said Ozias W

Shipman, defendant, to recover the sum of nineteen thousand five hundred and sixty-four and $\frac{80}{100}$ dollars, with interest thereon from the 18th day of June, A. D. 1880, then due and payable to said plaintiff from said defendant on an account for goods sold and delivered by said plaintiff to said defendant; which action, pursuant to the petition of said defendant therefor, was, under the statute in such case made and provided, on the 7th day of December,
29 A. D. 1880, transferred to and is now pending in the circuit court of the United States, eastern division, southern district of Ohio, aforesaid; that since the commencement of said action the following payments have been made on said account to said plaintiff by said defendant, to wit:

1880, June 30.	Amount	charged	to			.....	$60 00
" July 26.	"	paid	to	C. & H. V.	order	.....	302 50
" 27.	"	"	"	"	"	.....	5,488 35
" " "	"	"	"	"	"	.....	243 20
" Aug. 30.	"	"	"	"	"	.....	1,218 85
" Sept. 6.		"	"	"	"	.....	5,705 00
					Total	.....	$13,017 90

leaving due and payable of said original principal the sum of six thousand five hundred and forty-six and $\frac{90}{100}$ dollars, with interest thereon from September 6th, A. D. 1880, and interest on said original principal from said 18th day of June, 1880, reduced by the interest on said several payments from the time when made to said 6th day of September, A. D. 1880; that said balance of six thousand five hundred and forty-six and $\frac{90}{100}$ dollars, with the interest just specified, is a just and lawful claim in favor of said plaintiff against said defendant, and is now justly due from said defendant to said plaintiff; that said plaintiff ought, as this affiant believes, to recover thereon against said defendant said last-mentioned sum, with the interest specified, and that said defendant is a non-resident of the State of Ohio.

30 Affiant further says that he has good reason to believe and does believe that the Columbus and Hocking Valley Railroad Co., a corporation organized under the laws of the State of Ohio, located, doing business, and having its principal office in the city of Columbus, within said county and State last named, and the Columbus and Toledo Railroad Company, a corporation organized under the laws of the State of Ohio, located, doing business, and having its principal office in the city of Columbus, within said county and State, have property of said defendant in their possession, jointly or severally, or both, to wit, moneys due and to become due upon claims of said defendant against them, jointly or otherwise, liable to be attached in this action; and further says not.

JOS. A. JEFFREY.

Sworn to before me and subscribed in my presence by said Joseph A. Jeffrey this 14th day of March, A. D. 1881.

JOHN McFADDEN,
Notary Public, Franklin County, Ohio. [SEAL.]

And afterwards, to wit, on the 30th day of March, A. D. 1881, there was issued out of the clerk's office of said court the following attachment and garnishee process, directed to the marshal of the district; said attachment, &c., is clothed in the words and figures following, to wit:

Attachment and Garnishee.

31 THE UNITED STATES OF AMERICA, } *ss:*
Southern District of Ohio, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

Whereas the Straitsville Central Mining Co. has this day, on the necessary affidavit being filed, obtained an order of attachment against Ozias W. Shipman in a certain action of law now pending in the circuit court of the United States for the southern district of Ohio, wherein the said The Straitsville Central Mining Company is plaintiff and the said Ozias W. Shipman defendant, to recover of the said defendant the sum of six thousand five hundred and forty-six and $\frac{95}{100}$ dollars, with interest:

Now, therefore, you, the said marshal, are hereby commanded to attach and safely keep the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, moneys, and effects of the said Ozias W. Shipman, defendant, in your district not exempt by law from being applied to the plaintiff's claim, or so much thereof as will satisfy to the said plaintiff his claim for six thousand five hundred and forty-six and $\frac{95}{100}$ dollars, with interest, and one hundred dollars, the probable cost of this action.

And of this order of attachment and of your proceedings thereon you will make due return on the nineteenth day of April, 1881.

Witness the Hon. Morrison R. Waite, Chief Justice of the United States, this 30th day of March, A. D. 1881, and in the 105 year of the Independence of the United States of America.

WILLIAM C. HOWARD, *Clerk.* [SEAL.]

32 In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO. }
vs.
OZIAS W. SHIPMAN. }

To the Columbus and Toledo Railroad Company, a corporation, Columbus, Ohio:

You are hereby cited and admonished to be and appear before our said circuit court of the United States for the southern district of Ohio on Tuesday, the 7th day of June, A. D. 1881, then and there to answer all and singular the questions which may be propounded to you touching the money, property, or credits of every description of the said Ozias W. Shipman in your possession or control.

Hereof you are in nowise to fail, under the penalty of the law thence ensuing.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 30 day of March, A. D. 1881, and in the [SEAL.] 105th year of the Independence of the United States of America.

W. C. HOWARD, *Clerk.*

Endorsed: No. 23. U. S. circuit court, S. D. O., E. D. The Straitsville Central Mining Co. *vs.* Ozias W. Shipman. Notice to garnishee. Filed April 19th, 1881. William C. Howard, clerk.

33 In the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO.
vs.
OZIAS W. SHIPMAN.

To the Columbus and Hocking Valley Railroad Co., a corporation, Columbus, Ohio:

You are hereby cited and admonished to be and appear before our said circuit court of the United States for the southern district of Ohio on Tuesday, the 7th day of June, A. D. 1881, then and there to answer all and singular the questions which may be propounded to you touching the money, property, or credits of every description of the said Ozias W. Shipman in your possession or control.

Hereof you are in nowise to fail, under the penalty of the law thence ensuing.

Witness the Honorable Morrison R. Waite, Chief Justice of the [SEAL.] United States, this 30 day of March, A. D. 1881, and in the 105th year of the Independence of the United States of America.

W. C. HOWARD, *Clerk.*

Endorsed on cover: No. 23. U. S. circuit court, S. D. O., E. D. The Straitsville Central Min. Co. *vs.* Ozias W. Shipman. Notice to garnishee. Filed April 19, 1881. William C. Howard, clerk.

34 And afterwards, to wit, *in* the 7th day of April, A. D. 1881, the following answer was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Answer of Ozias W. Shipman.

United States Circuit Court for the Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

Answer.

First defense. And now comes the said defendant, Ozias W. Shipman, and for answer to the plaintiff's petition herein says he admits

that there is an open amount between the plaintiff and this defendant, but he denies that said amount is correctly stated in plaintiff's petition, and says that there is nothing due to the plaintiff from this defendant upon said amount, but, on the contrary, there is due to the defendant from the plaintiff upon said amount a large amount of money, as hereinafter stated.

Second defense, first counter-claim. For a further defense to said action and by way of counter-claim this defendant says that on the 28th day of May, 1879, the plaintiff and defendant made and entered into a contract, in and by which said plaintiff agreed to sell and deliver and did sell to this defendant all the coal raised and produced by the plaintiff from its Sugar Creek
35 lower vein coal, or so much *much* thereof as this defendant should need and require for his coal trade in the State of Michigan, for the term of one year from said 28th day of May, 1879, at the prices following, to wit: For lump coal by boat from Toledo, $2.20 per ton; for nut coal by boat from Toledo, $1 70 per ton; for nut coal on cars at Detroit, $2.10 per ton. That from the 28th day of May, 1879, to the 28th day of May, 1880, defendant needed and required for his coal trade and business in the State of Michigan all and largely more coal than was furnished by the plaintiff to this defendant during said period. Defendant admits that the amount rendered by plaintiff, a copy of which is attached to its petition, of coal delivered to him prior and up to October 1st, 1879, is correct, but he says that the rest and residue of said amount is incorrect and untrue in this, that the price of the coal therein stated largely exceeds the contract price therefor and the price at which said coal was sold by plaintiff to defendant. Defendant says that all the coal stated in said amount as delivered to this defendant after October 1st, 1879, was sold to defendant by plaintiff and purchased by defendant under and by virtue of the aforesaid contract between them and at the prices therein stated. Defendant says that he has advanced and paid to plaintiff from time to time, on account of the coal heretofore delivered and to be delivered, large sums of money, and exceeding in the aggregate by $4,991.64 the price and value of all the coal delivered by plaintiffs to defendant, and that by reason thereof there is due to the defendant from the plaintiff the sum of $4,991.64 on the amount for coal sold and delivered by plaintiff to defendant and moneys paid as aforesaid by defendant to
36 plaintiff, a true statement of which said account is hereto attached, marked A, and made a part hereof.

Third defense, second counter-claim. For a further defense to said action and by way of counter claim, this defendant says that, acting under the direction of said plaintiff and pursuant to and fully relying upon the aforesaid contract, this defendant made and entered into contracts for the same and delivery of coal to sundry persons, firms, and corporations at Detroit and its vicinity, in the State of Michigan, to be delivered from time to time during the continuance of said contract with the plaintiff, at prices which left but a small profit to this defendant; that at the time of making such contracts for the sale of

coal by this defendant as aforesaid this defendant informed said plaintiff thereof, and said plaintiff then agreed with this defendant that said plaintiff would furnish and deliver to the defendant the coal necessary to fulfill such contract on his part, but the defendant avers that from and after said first day of October, 1879, the said plaintiff neglected and refused to furnish such coal, although often requested so to do by this defendant, at the price agreed upon as aforesaid, and that by reason thereof the defendant was obliged to purchase, and did purchase, large quantities of coal from other persons than the plaintiff, and pay therefor greater prices than the prices at which the plaintiff had agreed as aforesaid to sell the same to this defendant, to the damage of this defendant ten thousand dollars.

The defendant says that by reason of the premises aforesaid he claims to set-off and counter-claim against the plaintiff in
37 action said several sums of $4,991.65 and $10,000, amounting in the whole to fourteen thousand nine hundred and ninety-one $\frac{64}{100}$ dollars, and the defendant demands judgment that the plaintiff take nothing by its said action, and that the defendant recover judgment against the plaintiff for fourteen thousand nine hundred and ninety-one $\frac{64}{100}$ dollars.

By J. N. DEXTER,
HOFFMAN & HOFFMAN,
DEWITT & HOFFMAN,
His Attorneys.

THE UNITED STATES OF AMERICA, }
Eastern Division, Southern District of Ohio, } *ss:*

The said defendant, Ozias W. Shipman, being first duly sworn, says that his foregoing answer and the matters therein contained are true in substance and in fact, as he verily believes.

O. W. SHIPMAN.

Sworn to before me and signed by said O. W. Shipman in my presence this 7th day of April, 1881.

PAUL JONES, [SEAL.]
Notary Public.

38 The bill rendered by plaintiff to Oct. 1, 1879, is correct.

Bal. then due			$3,044 85
Oct. % their statement is—			
1st %		$1,725 00	
2nd "		5,601 76	
Overcharges		7,386 70	7,386 70
492½ tons lump, @ 20c.		98 50	
1,003 " " " 30c.		300 90	
434 " " " 10c.		43 40	
542½ " " " 20c.		308 50	
1,572 " " " 5c.		78 60	
Credits		$829 90	
Rebates & error	1,908 30		
Cash & note	2,053 94		
		3,962 24	
		4,892 14	
Debit %			10,431 55
Deduct cr. items			4,892 14
Bal. to next %			5,539 41
Nov. %, their statement		$4,160 57	
Overcharges:			
78 t., @ 25c.	19 25		
638½ " " $1.05	690 43		
353 " " 55c.	194 15		
221 " " 15c.	33 15		
283 " " 85c.	240 55		
747½ " " $1.00	747 50		
270 " " 45c.	121 50		
180 " " 40c.	72 80		
		2,119 33	
Rebates & overcharges is credited		400 95	
Cash		3,500 00	
		6,020 28	
Deduct %, their statement		4,160 57	
			1,859 71
Bal. to next %		1,859 71	$3,679 70
39			
Bal. brought up			$3,679 70
Dec. %, their statement		8,204 40	
Overcharges:			
914 t., @ 45c.	411 30		
1,406 " 60c.	843 60		
(— 65) 2,725 " 60c.	1,635 00		
824 " 25c.	206 00		
	3,095 90		
Cash, &c.	3,513 18		
		6,609 08	
			1,595 36
Bal. to next %			5,275 06

Jan'y %, their statement		6,055 25	
Overcharges:			
827 t., @ 15c	124 05		
2,239 " 60c	1,343 40		
2,236 " 55c	1,229 80		
	2,697 25	2,697 25	
			3,358 00
Bal. to next %			8,633 06
Feb'y %, their statement		7,195 25	
Overcharges:			
793 t., @ 25c	198 25		
2,261 " 55c. }	2,998 60		
3,191 " 55c. }			
	3,196 85		
Cash	3,000		
		6,196 85	
			998 40
Bal. to next %			9,631 46
March %, their statement		$2,642 20	
Overcharges:			
338 t., @ 25c	84 50		
2,074 " 50	1,030 50		
	1,114 00		
Cash, &c	13,954 85		
		15,068 85	
			12,426 65
Bal. to cr. O. W. S			$2,795 19
Apr. %, their statement		$4,143 90	
Overcharges:			
879 t., @ 25c	219 75		
3,087 " 50c	1,543 50		
	1,763 25		
Cash	1,500		
		3,263 25	
			880 65
Bal. to cr. O. W. S. to next %			1,914 54
40			
Bal. to cr. O. W. S. brought up			$1,914 54
May % to May 28th, their statement		$9,376 60	
Overcharges:			
565 t., @ 25c	141 25		
3,400 " 50	1,700 00		
1,739 " 60	1,043 40		
69 " 40	27 60		
	2,912 25		
Cash, &c	9,541 45		
		12,453 70	
			3,077 10
			4,991 64

41 And afterwards, to wit, on the 19th day of March, A. D. 1881, came the marshal of the district to whom the aforesaid attachment, &c., was in form directed, and returned the same into the clerk's office of said court, with his proceedings thereon in the words and figures following, to wit:

Received this writ at Columbus, O., at 10 o'clock a. m. on the 30 day of March, 1881, and executed the same at Columbus, O., on the *the* Columbus & Toledo Railroad Company by delivering a true copy thereof personally to F. H. Medary, as secretary, at 10 o'clock a. m. on the 31st day of March, 1881, the president not being found within my jurisdiction and the said secretary being the next highest officer of the same.

Also left a true copy of within writ at the office of said company for M. M. Green, president, at 4.20 o'clock p. m. on the 1st day of April, 1881.

J. C. ULLERY,
U. S. Marshal,
By J. H. GROVE, *Deputy.*

2 services	$4 00
2 copies	1 00
2 miles	12
	$5 12

42 And afterwards, to wit, on the 19th day of March, A. D. 1881, came the marshal of the district to whom the aforesaid attachment, &c., was in form directed, and returned the same into the clerk's office of said court, with his proceedings thereon in the words and figures following, to wit:

Received this writ at Columbus, O., at 10 o'clock a. m. on the 30 day of March, 1881, and executed the same at Columbus, O., on the Columbus & Hocking Valley R. R. Company by delivering a true copy thereof personally to T. J. Janney, as secretary, at 10.15 o'clock a. m. on the 31st day of March, 1881, the president not being found within my jurisdiction and the said secretary being the next highest officer of the same.

Also left a true copy of within writ at the office of said company, for M. M. Green, president, at 4.20 o'clock p. m. on the 1st day of April, 1881.

J. C. ULLERY,
U. S. Marshal,
By J. H. GROVE, *Deputy.*

2 services	$4 00
2 copies	1 00
2 miles	12
	$5 12

43 And afterwards, to wit, on the 6th day of June, A. D. 1881, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENT. MIN. CO.
vs.
OZIAS W. SHIPMAN. } In Attachment. No. 23.

The Columbus and Hocking Valley Railroad Co., garnishee in this proceeding, for answer saith—

That at the time of its garnishment herein, to wit, April 1, 1881, there was due from it on account to said defendant, Ozias W. Shipman, the sum of ten thousand eight hundred and eleven dollars and thirty-five cents ($10,811.35), against which there was filed with said company an order by said Shipman in favor of Peter Hayden for the sum of two thousand six hundred and six dollars and sixty-nine cents ($2,606.69), bearing date March 25, 1881, leaving the balance due said Shipman from said company on April 1, 1881, eight thousand two hundred and four dollars and sixty-six cents ($8,204.66).

By JAMES A. WILCOX, *Its Att'y.*

THE STATE OF OHIO, }
Franklin Co., } *ss:*

On this 4th day of June, A. D. 1881, personally came before me, a notary of said county, T. J. Janney, who, being duly sworn, says that he is auditor and ag't of the above-named Columbus
44 and Hocking V-lley Railroad Co., which is a corporation of the State of Ohio, and that he believes the facts stated in the foregoing answer to be true.

T. J. JANNEY.

Sworn to and subscribed before me the day and year above written.

Witness my hand and official seal.

F. H. MEDARY,
Notary Public of Franklin Co., Ohio. [SEAL.]

And afterwards, to wit, on the 6th day of June, A. D. 1881, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer of the Columbus & Toledo R. R. Co.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO. *vs.* OZIAS W. SHIPMAN. } In Attachment. No. 23.

The Columbus and Toledo Railroad Company, garnishee in this proceedings, for answer, saith—

That it had not at the time of its garnishment herein, to wit, March 31, 1881, nor at any other time, before or since, in its possession or control any property, money, or credits or any description of the defendant, Ozias W. Shipman.

By JAMES A. WILCOX,
Its Attorney.

45 THE STATE OF OHIO, *Franklin County,* } *ss:*

On this 4th day of June, A. D. 1881, personally came before me, a notary of said county, T. J. Janney, who, being duly sworn, says that he is the auditor and agent of the above-named Columbus and Toledo Railroad Company, which is a corporation of the State of Ohio, and that he believes the facts stated in the foregoing answer to be true. T. J. JANNEY.

Sworn to and subscribed before me the day and year above written.

Witness my hand and official seal.

F. H. MEDARY,
[SEAL.] *Notary Public of Franklin County, Ohio.*

And afterwards, to wit, on the 8th day of June, A. D. 1881, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, p. 54.

On motion, this cause is continued by consent of all parties.

46 And afterwards, to wit, on the 29th day of November, A. D. 1881, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MIN. CO. *vs.* OZIAS W. SHIPMAN. } Reply.

First. Now comes The Straitsville Central Mining Co., plaintiff, and for reply to the second defense, "first counter-claim," in the answer of said Ozias W. Shipman contained, denies each of the following allegations, to wit:

"That on the 28th day of May, 1879, the plaintiff and defendant made and entered into a contract in and by which said plaintiff agreed to *see* and deliver and did sell to the defendant all the coal raised and produced by the plaintiff from its Sugar Creek lower-vein coal or so much thereof as this defendant should need and require for his coal trade in the State of Michigan for the term of one year from said 28th day of May, 1879, at the prices following, to wit: For lump coal by boat from Toledo, $2.20 per ton; for nut coal by boat from Toledo, $1.70 per ton; for lump coal on cars at Detroit, $2.60 per ton; for nut coal on cars at Detroit, $2.10 per ton; * * * that the rest and residue of plaintiff's account after October 1st, 1879, is incorrect and untrue in this, that the price of the coal therein stated largely exceeds the contract price
47 therefor and the price at which said *said* coal was sold by plaintiff to defendant; that all the coal stated in said plaintiff's account as delivered to this defendant after October 1st, 1879, was sold to defendant by plaintiff and purchased by defendant under and by virtue of the aforesaid contract between them and at the prices therein stated; that said defendant has advanced and paid to plaintiff from time to time *an* account of the coal heretofore delivered and to be delivered large sums of money, to wit, $4,991.64, or any other sum whatever in excess of the price and value of all the coal delivered by plaintiff to defendant, and that by reason thereof there is due to the defendant from the plaintiff the sum of $4,991.64 or any other sum whatever on the account for coal sold and delivered by plaintiff to defendant and moneys paid as aforesaid by defendant to plaintiff; a true statement of which said account is attached to said defense, marked A, and made a part thereof."

The plaintiff, having no knowledge in regard to the following allegations of said defense except such as it *denies* from the answer, cannot admit, but denies, "that from the 28th day of May, 1879, to the 28th day of May, 1880, defendant needed and required for his coal trade and business in the State of Michigan all and largely more coal than was furnished by the plaintiff to this defendant during said period."

Second. For its reply to the third defense, "second counter-claim," of said defendant's answer, it denies each and every allegations thereof except admissions and repetitions in regard to items of plaintiff's account.

Third. The plaintiff says that since the commencement of this action the defendant has become and is entitled to the following credits upon the account attached to its petition herein, to wit:

48

1880. June 30.	By amount charged to C. B. Pfaher		$60 00
" July 26.	Paid by C. & H. V. R. R. on shipment order		302 50
" " 27.	" " " " " "		5,488 35
" " "	" " " " " "		243 20
" Aug. 20.	" " " " " "		1,218 85
" Sept. 6.	" " " " " "		5,705 00
Total			$13,017 90

leaving the balance due plaintiff from defendant, $6,546.90, with interest thereon from said 18th day of June, 1880, and interest on said instalments from said last-mentioned date to the several dates of their payment; for which and costs said plaintiff prays judgment against said defendant.

J. T. HOLUMS,
Att'y for Plaintiff.

UNITED STATES OF AMERICA,
Southern District of Ohio, Eastern Division, } ss:

Joseph A. Jeffrey, being first duly sworn, says that he is the treasurer of the plaintiff, a corporation above named, duly authorized in the premises; that the statements contained in its foregoing reply are true as he verily believes; and further says not.

JOSEPH A. JEFFREYS.

Sworn to before me and subscribed in my presence by said Joseph A. Jeffrey this 26th day of November, 1881.

JOHN F. McFADDEN,
Notary Public. [SEAL.]

(Endorsed:) I hereby consent to the filing of within reply. R. C Hoffman, att'y for def't.

49 And afterwards, to wit, on the 9th day of December, A. D. 1881, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, p. 110.

On application of the plaintiff this cause is continued to the next term of this court, at its costs, and leave is given the defendant to amend his answer herein within 60 days from this date.

50 And afterwards, to wit, on the 7th day of June, A. D. 1882, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, p. 156.

On application to the court defendant is allowed ten days in which to file an amended answer, and this cause is continued to the next term of this court.

And afterwards, to wit, on the 5th day of December, A. D. 1882, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, p. 187.

Continued by consent.

And afterwards, to wit, on the 6th day of December, A. D. 1882 the following amended answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Amended Answer.

United States Circuit Court for the Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
against
OZIA- W. SHIPMAN, Defendant.

Civil action. Amended answer.

First defense. And now comes the said defendant, Ozias W. Shipman, and for his amended answer to the plaintiff's petition herein says he admits that there is an open account between the plaintiff and this defendant, but he denies that said account is cor-
51 rectly stated in plaintiff's petition, and says that there is nothing due to the plaintiff from this defendant upon said account, but, on the contrary, there is due to the defendant from the plaintiff upon said account a large amount of money as hereinafter stated.

Second defense, first counter-claim. For a further defense to said action and by way of counterclaim this defendant says that on the 28th day of May, 1879, the plaintiff and defendant made and entered into a contract in and by which said plaintiff agreed to sell and deliver and did sell to this defendant all the coal raised and produced by the plaintiff from its Sugar Creek lower-vein coal or so much thereof as this defendant should need and require for his coal trade in the State of Michigan for the term of one year from the said 28th day of May, 1879, at the prices following, to wit: For lump coal by boat from Toledo, $2.20 per ton; for nut coal by boat from Toledo, $1.70 per ton; for lump coal on cars at Detroit, $2.60 per ton; for nut coal on cars at Detroit, $2.10 per ton; that from the 28th day of May, 1879, to the 28th day of May, 1880, defendant needed and required for his coal trade and business in the State of Michigan all and largely more coal than was furnished by the plaintiff to this defendant during said period. Defendant admits that the account, rendered by plaintiff, a copy of which is attached to its petition, of coal delivered to him prior and up to October 1, 1879, and after May 28, 1880, is correct, but he says that the rest and residue of said account is incorrect and untrue in this, that the price of the coal therein stated largely exceeds the contract price therefor and the price at which said coal was sold by plaintiff to defendant. Defendant says that all the coal stated in
52 said account as delivered to this defendant after October 1st, 1879, and prior to May 28, 1880, was sold to defendant by plaintiff and purchased by defendant under and by virtue of the aforesaid contract between them and at the price therein stated. Defendant says that he has advanced and paid to plaintiff from time

to time on account of the coal heretofore delivered and to be delivered large sums of money and exceeding in the aggregate $10,921.11, the price and value of all the coal delivered by plaintiff to defendant, and that by reason thereof there is due to the defendant from the plaintiff the sum of $10,921.11 on the account for coal sold and delivered by plaintiff to defendant and monies paid as aforesaid by defendant to plaintiff; a true statement of which said account is hereto attached, marked "A," and made a part hereof.

Third defense, second counter-claim. For a further defense to said action and by way of counter-claim this defendant says that, acting under the direction of said plaintiff and pursuant to and fully relying upon the aforesaid contract, this defendant made and entered into contracts for the sale and delivery of coal to sundry persons, firms, and corporations at Detroit and its vicinity in the State of Michigan to be delivered from time to time during the continuance of said contract with the plaintiff at prices which left but a small profit to this defendant; that at the time of making such contracts for the sale of coal by this defendant as aforesaid this defendant informed said plaintiff thereof, and the said plaintiff then agreed with this defendant that said plaintiff would furnish and deliver to the defendant the coal necessary to fulfil such contracts on his part; but the defendant avers that from and after said 1st day of October,
53 1879, the said plaintiff neglected and refused to furnish such coal, although often requested to do so by this defendant, at the price agreed upon as aforesaid, and that by reason thereof the defendant was obliged to purchase and did purchase large quantities of coal from other persons than the plaintiff, and pay therefor greater prices than the prices at which the plaintiff had agreed as aforesaid to sell the same to this defendant, statement of which purchases, marked "Exhibit B," and of which sales, marked "Exhibit C," is hereto attached and made part hereof, to the damage of this defendant $10,000.

The defendant says that by reason of the premises aforesaid he claims to set-off and counter-claim against the plaintiff in this action said several sums of $10,421 and $10,000, amounting in the whole to twenty thousand nine hundred twenty-one and $\frac{11}{100}$ dollars, and the defendant demanded judgment that the plaintiff take nothing by its said action, and that the defendant recover judgment against the plaintiff for twenty thousand four hundred twenty-seven and $\frac{23}{100}$ dollars.

By J. N. DEXTER.
HOFFMAN & HOFFMAN AND
DE WITT & HOFFMAN,
His Attorneys.

UNITED STATES OF AMERICA,
Eastern District of Michigan, } ss:

The said defendant, Ozias W. Shipman, being first duly sworn, says that his foregoing amended answer and the matters therein contained are true in substance and in fact as he verily believes.

OZIAS W. SHIPMAN.

54 Sworn to before me and signed by said Ozias W. Shipman in my presence this 20th day of June, 1882.

D. I. DAVISON,
U. S. Com., East Dist. Michigan.

55 DEFENDANT'S EXHIBIT "A." Referred to in the Annexed Amended Answer.

Ozias W. Shipman in % with Straitsville Central Mining Co.

October %.

1879.	To bal. from Sept. %	3,044 85	
	" 1,115 tons nut at Detroit, 25c	278 75	
	" 1,495 " lump, at 70c	1,046 85	
	" 878½ " " Eureka I. Co., 70c	614 95	
	" 444 " " D., S. & N. R'y, 70c	310 80	
	" 451½ " " D., B. C. R'y, 70c	316 05	
	" 202½ " " paid from Toledo, 70c	141 75	
	" f't p'd to Toledo on same, 1.75	341 25	
	" 1,572 tons on vessels at Toledo, 2.20	3,458 40	
	" 60 tons extra, 70c	42 00	
		9,595 65	

CR.

By rebate on 3,191 tons to Detroit, 55c		1,755 05
" " " 80 " " Ind. Rapids, 25c		20 00
" overcharge on coal to Toledo		26 00
" rebate on 202½ tons from Toledo, 55c		111 37
" " " 435 " to D., B. C. R'y, 55c		239 25
" " " 428 " D., S. & N. R'y, 55c		235 40
By bal. to Nov.		7,208 58
		9,595 65

56 Sheet No. 2.

November %.

To bal. from Oct. %	7,208 58	
" 299 tons nut to Detroit, 25c	74 75	
" 1,035½ tons lump to Detroit, 70c	724 85	
" 1,030½ " " Eureka, 70c	721 35	
" 135 " " D., S. & N. R'y, 70c	74 50	
" 135 " " D., B. C. R'y, 70c	94 50	
182 " for B. vessel, Toledo, 2 20	400 40	
	9,318 93	

CR.

By cash	331 30
" note of Baugh Forge, less discount	1,722 64
" balance to Dec. %	7,264 99
	9,318 93

December %.

To balance from Nov. %	7,264 99	
" car 4267, in Nov., 13 tons, 70c	9 10	
" 2,790 tons lump, Detroit, 70c	1,953 00	
824 " nut, " 25c	260 00	
1,406 " lump, Eureka, 70c	984 00	
914 " " on vessel at Toledo, 2.20	2,010 18	
	12,427 89	

CR.

		By car 4192, 13 tons nut (in twice), 25c	3 25
Dec.	10.	" cash	1,000 00
	"	" acceptances	1,500 00
	24.	" cash	1,000 00
	31.	" C. B. Pfahlus, bill paid	13 18
		" bal. to Jan. %	8,911 46
			12,427 89

57 Sheet No. 3.

January %.

1880.		To balance from Dec. %	8,911 46
		" 14 cars slack, 75c	10 50
		" 11 " nut (slack), 75c	8 25
		" 827 tons nut, Detroit, 25c	206 75
		2,623 " lump, " 70c	1,836 10
		1,852 " " Eureka, 70c	1,296 40
			12,269 46

CR.

By 65 tons to T. & A. A. R'y, ch'g'd O. W. S., 70c		45 50
" cash		2,000 00
" def't paid		1,500 00
" bal. to Feb. %		8,723 96
		12,269 46

February %.

To bal. from Jan. %	8,723 96	
" 793 tons nut to Detroit, 25c	198 25	
" 2,261 " lump " 70c	1,582 70	
3,191 " " Eureka	2,233 70	
	12,738 51	

CR.

By car 4438, 13 tons, 70c	9 10
" bal. to March %	12,729 41
	12,738 51

58 Sheet No. 4.

March %.

1880.		To bal. from Feb. %	12,729 41
		" 338 tons nut to Detroit, 25c	84 50
		" 1,892 " lump to " 70c	1,324 40
		" 182 " " Eureka, 70c	127 40
			14,265 71

CR.

		By car 3543, billed wrong, 13 tons, @ 70c	9 10
M'ch	11.	" cash	3,000 00
		" bal. to April %	11,256 61
			14,265 71

April %.

1880.		To bal. from March %	11,256 61
		" 879 tons nut to Detroit, 25c	219 75
		" 2,838 " lump to " 70c	1,986 60
		" 249 " " Eureka, 70c	174 30
			13,637 26

CR.

Apr.	9.	By cash of C. & H. V. R'y, sundry rebates			12,454 85
		" def't paid			1,500 00
		To bal. of % to May %		317 59	
				13,954 85	13,954 85

59 Sheet No. 5.

May %.

To	565 tons nut to Detroit, 25c	141 25	
"	3,430 " lump " 70c	2,380 00	
"	1,739 " " f. o. b. vessel at Toledo, 2,20	2,825 80	
"	69 " nut " " " " 1.70	117 30	
		6,464 35	

CR.

		By balance from April %		317 59
May	17.	" cash		1,500 00
		" balance to June %		4,646 76
				6,464 35

June %.

To	bal. from May %	4,646 76	
"	coal %, p'r statement rend	11,799 33	
		16,446 09	

CR.

June	2.	By cash of C. & H. V. R'y, sundry rebates		6,541 45
	11.	" 3 acceptances		3,000 00
		" bal. to July %		6,904 64
				16,446 09

60 Sheet No. 6.

July %.

1880.	To	bal. from June %	6,904 64
	"	coal, as per statement rend	5,562 80
			12,467 44

CR.

July	27.	By order paid by C. & H. V. R'y		243 20
		" am't charged to C. B. Pfahler		60 00
		" order paid by C. & H. V. R'y		302 50
		" " " " " "		5,488 35
		" 3 acceptances		4,327 21
		" balance to next %		2,046 18
				12,467 44
		To bal. brought down	2,046 18	

CR.

Aug.	30.	By order paid by C. & H. V. R'y		1,218 85
	6.	" " " " "		6,561 93
	9.	" " " " "		5,186 51
		Bal. due O. W. Shipman	10,921 11	
			12,967 29	12,967 29

61 EXHIBIT B.

Statement of coal bought by O. W. Shipman, def't, to fill his contract and to supply his trade at Detroit, in addition to coal sold and delivered to him by The Straitsville Central Mining Co., plaintiff, from the 1st day of October, 1879, to the 28th day of May, 1880, to wit:

1879.			
Oct.	From Joseph H. Somers, of Columbus, Ohio:		
	726½ tons of lump coal, @ 1.00 per ton		726 50
	39 " " nut " @ 40c. " "		15 60
"	From the Shawnee Valley Coal Co. of Shawnee, O.:		
	860⅞ tons of lump coal, @ $1.00		860 10
"	From the Cambridge Coal Co. of Cambridge, O.:		
	421½ tons of lump coal, @ $1.00		421 50
"	From W. T. Upson, of Shawnee, Ohio:		
	683⅞ tons of lump coal, @ $1.00		683 85
	Total cost for October		$2,707 55
	2,691⅛ tons lump.		
	39 tons nut.		
November.	From Cambridge Coal Co. of Cambridge, O.:		
	217 tons lump coal, @ $0.80c		173 60
	82½ " " " @ 90c		74 25
	208½ " " " @ .95		198 02
"	From J. H. Somers, of Columbus, O.:		
	405 tons lump coal, @ 1.75		708 75
	91 " " " 1.35		122 85
			1,277 47

62

1879.	November ac. for'd		1,277 47
November.	From J. H. Somers, Columbus, O.:		
	13 tons nut coal, @ 60c		7 80
	13 tons nut coal, @ 75c		9 75
	From Stubursky & Lanyon, of Detroit, Mich.:		
	208⁷¹⁰⁄₂₀₀₀ tons lump coal, @ $4.50		937 59
	Total for November		$2,232 61
	716⁷¹⁰ tons lump.		
	26 " nut.		
December.	From J. H. Somers, of Columbus, Ohio:		
	932 tons lump, @ 1.45		$1,351 40
	53 " nut coal, @ .70		37 10
	From Shawnee Valley Coal & Iron Co. of Shawnee, O.:		
	833¾ tons lump, @ 1.40		1,167 25
	From Monday Creek Coal & Iron Co. of Cleveland, O.:		
	227½ tons lump coal, @ 1.35		307 12
	117 tons nut coal, @ 60c		70 20
	Total for December		$2,633 07
	1,993¼ tons lump.		
	170 tons nut.		

63

1880.

Jan'y.	From Monday Creek Coal & Iron Co. of Cleveland, Ohio:	
	$572\frac{1}{10}$ tons lump coal, @ 1.35	772 33
	351 tons nut coal, @ 60c	210 60
"	From J. H. Somers, of Columbus, O.:	
	1,802 tons lump coal, @ 1.35	2,432 70
	195 tons nut coal, @ 65c	126 75
	From New York & Straitsville Coal & Iron Co. of Shawnee, Ohio:	
	709 tons lump coal, @ 1.35	957 15
	From Shawnee Valley Coal & Iron Co. of Shawnee, Ohio:	
	324 tons lump coal, @ $1.40	453 60
	$864\frac{3}{10}$ tons lump coal, @ 1.35	1,166 80
	Total for Jan'y	$6,119 93

$4,271\frac{4}{10}$ tons lump.
546 tons nut.

Feb.	From J. H. Somers, of Columbus, Ohio:	
	1,124 tons lump coal, @ $1.25	$1,405 00
	160 tons nut coal, @ .60	78 00
"	From Shawnee Valley Coal & Iron Co. of Shawnee, Ohio:	
	$70\frac{3}{20}$ tons lump coal, @ 1.35	94 70
	From New York & Straitsville Coal & Iron Co. of Shawnee, Ohio:	
	$574\frac{9}{20}$ tons lump coal, @ 1.50	861 60
	24 tons nut coal, @ 60c	14 40
	Total for Feb'y	2,453 70

$1,768\frac{6}{10}$ tons lump.
184 tons nut.

64

1880.

March.	From Nelsonville Coal & Coke Co. of Columbus, Ohio:	
	108 tons lump coal, @ $1.25	$135 00
"	From Shawnee Valley Coal & Iron Co. of Shawnee, Ohio:	
	$70\frac{3}{10}$ tons lump, @ $1.35	94 70
	$79\frac{1}{20}\frac{3}{0}$ tons lump coal, @ $1.30	103 55
	From J. H. Somers, of Columbus, Ohio:	
	52 tons lump coal, @ $1.30	62 40
	13 tons nut coal, @ 60c	7 80
		$403 45

$309\frac{1}{2}\frac{8}{0}$ tons lump.
13 " nut.

April.	From J. H. Somers, of Columbus, Ohio:	
	384 tons lump coal, @ $1.15	$441 60
	208 tons nut coal, @ .50	104 00
"	From W. H. Shounnaker & Co., Columbus O.:	
	65 tons lump coal, @ 1.10	71 50
"	From Shawnee Valley Coal & Iron Co. of Shawnee, Ohio:	
	875 tons nut coal, @ .55	481 25
		$1,098 35

449 tons lump.
1,083 tons nut.

65

1880.

May.	H. C. Will & Co., of Columbus, Ohio:	
	390 tons lump coal, @ $1.15	$448 50
"	From J. H. Somers, of Columbus, Ohio:	
	1,048 8/10 tons lump coal, @ $1.15	1,206 15
"	From Shawnee Valley Coal & Iron Co. of Shawnee, Ohio:	
	46 tons nut coal, 50c	23 00
"	From Nelsonville Coal & Coke Co. of Columbus, Ohio:	
	197 tons lump coal, @ 1.15	226 55
	13 tons nut coal, @ 35c	4 55
		$1,908 75

1,635 8/10 tons lump.
59 " nut.

Grand totals:
13,836 510/2000 tons lump.
2,120 tons nut.
Total value $19,557 41

66

EXHIBIT "C."

Statement of Contracts for the Sale of Coal Made by O. W. Shipman between the 1st Day of June, 1879, and the First Day of October, 1879, with the Amount of Coal Delivered under such Contracts, the Price at which the Same was Sold, viz., for Deliveries from Oct. 1, 1879, to May 28, 1880.

The Grand Trunk railway:					
243 tons in October, 1879,	@	$2.68			651 24
65 1900 tons in Nov.,	"	"			176 75
402 700 " Dec.,	"	"			1,078 33
1,084 " Jan'y, 1880,	"	"			3,239 29
158 600 " Feb.,	"				514 47
1,953 1200 tons lump coal,	"				5,660 08

Contract made about July 10th, 1879.

1879. The Detroit, Grand Haven and Milwaukee railway:

In October.	680½ tons,	$2.80			1,822 60
" November.	175½	"	"		491 40
" December.	283½	"	"		811 80
1880.					
" January.	163	"	"		456 40
	1,302¼				3,581 20

Contract made about Sept. 1, 1879.

67

1879. Eastern Michigan Asylum of Pontiac, Mich.:

In October.	108 tons nut,	@	$3.39		366 12
" "	13 1025 tons lump,	@	$3.85		52 02
" Nov.	85 1432 " nut,	"	3.39		290 57
" "	96 415 " lump,	"	3.85		370 39
" Dec.	294 075 " nut,	"	3.39		996 79
" "	26 1190 " lump,	"	3.85		102 39
1880.					
" Jan'y.	605 225 " nut,	"	3.39		2,051 38
" Feb.	253 575 " "	"	"		858 65
" M'ch.	40 050 " "	"	"		135 60
" May.	115 1560 " "	"	"		439 96
					$5,663 87

1,501 1947 tons nut.
136 630 " lump.

Contract made about July 1, 1879.

1879.	To Baugh Steam Forge at Detroit, Mich.:			
In October.	616[546]	tons lump, @ 2.65		1,632 12
" Nov.	123[1275]	" " " "		327 64
" Dec.	1,286[1310]	" " " "		3,409 63
1880.				
" Jan'y.	1,287[765]	" " " "		3,411 55
" Feb.	912[958]	" " " "		2,420 06
" March.	174[375]	" " " "		451 60
" April.	195[395]	" " " "		517 27
" May.	416[155]	" " " "		1,102 60
	5,111[1779]			13,283 47

Contract made July 24, 1879.

68

1879.	To Steam Supply Co., Detroit, Mich.:			
Oct.	510[910]	tons nut coal, @ $2.38.		
"	1[470]	" lump " "	2.80.	
Nov.	187[1120]	" nut " "	2.38.	
"	506[1030]	" lump " "	2.80.	
"	162[1230]	" slack " "		
Dec.	395[1943]	" lump " "	2.80.	
"	144[1860]	" nut " "	2.38.	
"	554[100]	" slack " "		
1880.				
Jan'y.	114[270]	" lump " "	2.80.	
"	567[695]	" nut " "	2.38.	
"	618[1035]	" slack " "		
Feb.	601[1925]	" nut " "	2.38.	
"	455[1426]	" slack " "		
M'ch.	405[490]	" nut " "	2.38.	
Apr.	324[650]	" slack " "		
"	19[300]	" nut " "	2.38.	
	317[1350]	" slack "		
May 28.	201[1710]	" " "		
	1,017[1710]	tons lump.		
	2,436[1695]	" nut.		
	2,634[1495]	" slack.		

Contract made June 24, 1879.

69

1879.	To Fulton iron & engine works, at Detroit, Mich. :			
Oct.	1[1350]	tons lump coal, @ —.		
"	29[410]	" nut " "		
Nov.	15[960]	" lump " "		
"	20[1340]	" nut " "		
Dec.	24[1100]	" lump " "		
"	24[1100]	" nut " "		
1880.				
Jan'y.	13[490]	" lump " "		
Feb.	13[140]	" lump " "		
"	36[1535]	" nut " "		
March.	44	" lump " "		
April.	43	" lump " "		
May, to 28.	24[130]	" lump " "		
	178[1270]	tons lump.		
	111[485]	" nut.		

Contract made about June 1, 1879.

70

1879. To Vail & Cram, at Detroit, Mich.:
Oct. 20^{1000} tons lump coal @ —.
Nov. 27 " " "
Dec. 26^{1000} " " "
1880.
Jan'y. 24^{1000} " " "
Feb. 16^{1000} " " "
M'ch. 13 " " "
April. 20^{1000} " " "
May, to 28. 15 " " "

163^{1000} " " " @ 3.00..... 408 75

Contract made about July 10th, 1879.

1879. To Detroit Safe Co. of Detroit, Mich.:
Oct. 16^{1000} tons nut coal.
Nov. 22^{1000} " nut "
7^{1950} " lump "
Dec. 31^{1000} " nut "
17 " nut "
1880.
Jan'y. 1^{610} " lump "
Feb. 44 " nut "
March. 23 " nut "
Apr. 32^{1000} " nut "
May, to 28. 15 " lump "

24^{0360} tons lump coal, @ 3.00..... $72 81
164^{1000} " nut coal, " 2.35..... 386 57

Contract made about July 15th, 1879.

71

1879. To Pullman Palace Car Co., Detroit, Mich.:
October. 226^{1600} tons lump, 3.30.
November. 319^{0400} " "
December. 399 " "
1880.
Jan'y. 333 " "
Feb. 321^{1000} " "
March. 412 " "
April. 340 " "
May, to 28. 177 " "

2,528[1000] tons lump coal, @ 3.30..... $8,344 05

Contract made July 1, 1879.

1880. To Hammond Standish & Co., of Detroit, Mich.:
Oct. 27 tons lump coal.
Nov. 56^{500}
Dec. 126^{1500} " " "
1880.
Jan'y. 67^{100} " " "
Feb. 54 " " "
March. 13 " " "
April. 43 " " "
May, to 28. 164^{1000} " " "

551^{1100} tons lump coal @. —.

Contract made about Aug. 1st, 1879.

72

1879. To U. S. custom-house:
Nov. 18^{1000} tons lump coal.
Dec. 58^{300} " " "
1880.
Jan'y. 36^{400} " " "
Feb. 35 " " "

147^{1700} tons lump coal @ $2.97 gross ton, or $2.65 per net ton..... 395 96

Contract made about July 1, 1879.

1879. To Detroit Iron & Brass Mfg. Co., of Detroit, M.:
Oct. 28^{565} tons nut coal @ 2.60.
Nov. 32^{1950} " "
13^{1500} " lump.
Dec. 40^{410} " nut.
1880.
Jan'y. 44^{1300} " "
Feb. 37^{500} " "
M'ch. 46^{1500} " lump.
Apr. 29 " nut.
May, to 23. 11^{1870} " "
224^{595} tons nut @ 2.60.
54^{1000} " lump not in contract.

Contract made about Aug. 1, 1879.

73 To Eureka Iron Co. of Detroit, Mich.; coal delivered at Wyandotte, Mich.:
1879.
Oct. 2,130 tons lump coal @ $2.50.
Nov. 1,705 " " "
Dec. 2,949 " " "
1880.
Jan'y. 4,056 " " "
Feb. 4,554 " " "
M'ch. 2,609 " " "
April. 247 " " "
May, to 28. 2,216 " " "

20,466 tons lump coal, @ $2.50..... 51,165 00

The contract was made July 10, 1879, for one year, and above amounts were delivered under the contract.

1879. Detroit Railroad Elevator Co. of Detroit, Mich.:
Oct. 21^{1210} tons lump coal.
Nov. 15^{860} " " "
Dec. 35^{370} " " "
1880.
Feb. 16^{1200} " " "
M'ch. 19^{900} " " "
Apr. 25 " " "
May, to 28. 16 " " "

147^{340} tons lump coal, @ 3.00..... $441 82

Contract made about Aug. 1, 1879.

74

1879.	Detroit Car Spring Co. of Detroit, Mich.:			
Oct.	64	tons	lump coal @ 2.60.	
"	27	"	nut " 2.30.	
Nov.	27	"	lump "	
"	13^{1000}	"	nut "	
Dec.	27	"	lump "	
"	55	"	nut "	
Jan'y.	95^{1500}	"	lump "	
"	54	"	nut "	
Feb.	108	"	lump "	
M'ch.	27	"	lump "	
April	42^{1000}	"	lump "	
May, to 28.	127^{1000}	"	lump "	

518^{1500} tons lump @ $2.60	$1,348 75
149^{1000} " nut @ 2.30	343 85
	1,692 60

Contract made June 3, 1879.

75 *Recapitulation.*

	Tons lump.	Tons nut.
The Grand Trunk R'y Co.	$1,953^{1200}$	
The Detroit, Grand Haven & Milwaukee R'y Co.	$1,302^{1000}$	
Eastern Michigan asylum	136^{630}	$1,501^{1947}$
Baugh Steam Forge	$5,111^{1779}$	
Detroit Steam Supply Co.	$1,017^{1710}$	$2,436^{695}$
Fulton iron & engine works	178^{1270}	111^{485}
Vail & Cram	163^{1000}	
Detroit Safe Co	24^{560}	164^{1090}
Pullman Palace Car Co.	$2,528^{1000}$	
Hammond Standish Co.	551^{1100}	
U. S. custom-house	147^{1700}	
Detroit Iron & Brass Mfg. Co.	54^{1000}	224^{595}
Eureka Iron Co	20,466	
Detroit Railroad Elevator Co.	147^{540}	
Detroit Car Spring Co.	518^{1500}	149^{1000}
Totals	$34,302^{1989}$	$4,587^{1722}$

76 And afterwards, to wit, on the 20th day of December, A. D. 1882, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Eastern Division, Southern District of Ohio.

THE STRAITSVILLE CENTRAL MINING CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Reply to Amended Answer.

First. For reply to the alleged second defense, first counter claim, contained in the amended answer of said Ozias W. Shipman, defendan therein, The Straitsville Central Mining Company, plaintiff, having no knowledge except such as is derived from the claim of the plaintiff in that behalf, denies that on the 28th day of May,

1879, the plaintiff and defendant made and entered into a contract in and by which said plaintiff agreed to sell and deliver and did sell to this defendant all the coal raised and produced by the plaintiff from its Sugar Creek lower-vein coal or so much thereof as this defendant should need and require for his coal trade in the State of Michigan for the term of one year from said 28th day of May, 1879, at the prices following, to wit: For lump coal by boat from Toledo, $2.20 per ton; for nut coal by boat from Toledo, $1.70 per ton; for lump coal on cars at Detroit, $2.60 per ton; for nut
77 coal on cars at Detroit, $2.10 per ton; said plaintiff further denies each of the following allegations in said defense and counter-claim, contained, to wit, that the rest and residue of said plaintiff's account, to wit, from October 1st, 1879, to May 28th, 1880, is incorrect and untrue in this, that the price of the coal therein stated largely exceeds the contract price therefor and the price at which said coal was sold by plaintiff to defendant.

That all the coal stated in said account as delivered to this defendant after October 1st, 1879, and prior to May 28th, 1880, was sold to defendant by plaintiff and purchased by defendant under and by virtue of the aforesaid contract between them and at the price therein stated.

That he has advanced and paid to the plaintiff from time to time, on account of the coal heretofore delivered and to be delivered, large sums of money and exceeding in the aggregate $10,921.11, the price and value of all the coal delivered by plaintiff to defendant, and that by reason thereof there is due to the defendant from the plaintiff the sum of $10,921.11 or any other sum on the account for coal sold and delivered by plaintiff to defendant and moneys paid as aforesaid by defendant to plaintiff, a true statement of which said account is to said amended answer attached as part thereof. One the contrary, this plaintiff avers that on the 24th day of June, 1879, said defendant, by the name of O. W. Shipman, The Straitsville Coal Company, this plaintiff, and J. S. Doe & Co. entered into a contract, of which the following is a true copy, to wit:

78 "O. W. Shipman, Straitsville Coal Co., Straitsville Central Mining Co., and J. S. Doe & Co. agree with each other as follows:

Shipman agrees to represent the entire interests and sales of the coal of the other three parties aforesaid in the trade that may be denominated the Detroit trade by rail or by vessel to Detroit or to and through Detroit, Mich.; that he will confirm himself to the use and handling of their coal alone in all his sales of soft coal for whatever use or purposes or market, taking the same from them in equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he — take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and that he will labor to improve the market price of said coal, giving to said parties the

advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof, and that he will keep his books, sales, and contracts of coal all open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said Shipman under this agreement, and that they will aid and encourage the trade of said Shipman in all lawful way in their power so long as he shall confine his sales and operations in soft coal to the product of their mines.

Given under our hands this 24th day of June, A. D. 1879.

O. W. SHIPMAN.
STRAITSVILLE COAL CO.,
P'r JNO. D. MARTIN, *P't.*
STRAITSVILLE CENT. MIN. CO.,
By C. B. PFAHLER, *Gen. Ag't.*
J. S. DOE & CO."

79 That at the date of the execution of said contract, to wit, June 24, 1879, it was expressly agreed and understood by, between, and among the parties thereto that any and all other coal contracts existing between said Shipman and either or any of said three other parties were thereby and in consideration thereof cancelled and at an end, and the agreement above copied superseded by its terms and provisions all other coal contracts between or among said parties relating to the trade therein specified, was wholly inconsistent with the existence of such other contracts, and was the only agreement or arrangement then in force between and among the parties thereto aforesaid; that by the terms of said agreement this plaintiff undertook and bound itself to furnish one-third of the coal called for thereby, and no more, at the market price of such coal for the time being at their mines, except so far as said Shipman's then present trade and order were concerned, which were to be filled at the price to him of 70 cents per ton at the mines, each of said three parties furnishing one-third of the coal necessary therefor; that this plaintiff furnished and delivered to said defendant the coal by it furnished and delivered to him between said 1st day of October, 1879, and said 28th day of May, 1880, mentioned in its account to the petition herein attached, being the only items of said account in anywise put in issue or disputed by defendant under the terms and conditions of said contract of date of June 24th, 1879,
80 and no other so far as expressed agreement between them was operative or of any force and effect; that any other coal embraced in said account was sold and delivered on orders from said defendant under implied contract to pay therefor what the same was reasonably worth in the market at the several times of sale; that this plaintiff fully performed the condition of said contract on its part to be performed and fulfilled.

Second. For reply to the alleged third defense, second counterclaim, contained in the amended answer of said Ozias W. Shipman, defendant herein, The Straitsville Central Mining Company, plaintiff, denies each of the following allegations therein, to wit:

That acting under the direction of said plaintiff and pursuant to and fully relying upon the alleged contract of May 28, 1879, this defendant made and entered into contracts for the sale and delivery of coal to sundry persons, firms, and corporations at Detroit and in its vicinity in the State of Michigan to be delivered from time to time during the continuance of said contract with the plaintiff at prices which left but a small profit to this defendant.

That at the time of making such contracts for the sale of coal by this defendant as aforesaid this defendant informed said plaintiff thereof, and the said plaintiff then agreed with this defendant that said plaintiff would furnish and deliver to the defendant the coal necessary to ful*f*il such contracts on his part.

That from and after October 1st, 1879, the agreed price for such coal was as alleged in said amended answer, or that by reason of this plaintiff's refusal to furnish defendant coal at such alleged agreed price he was obliged to purchase and did purchase large
81 quantities of coal from other persons than the plaintiff and *and* pay therefor greater prices than the prices at which the plaintiffs had agreed as aforesaid to sell the same to this defendant, to the damage of this defendant $10,000 or any other sum whatever; and having no personal knowledge thereof in the premises except such as it derives from said amended answer, this plaintiff denies each and every allegation of said third defense, second counterclaim, connected with or contained in said Exhibits B and C.

On the contrary, this plaintiff avers that on the 24th day of June, 1879, said defendant, by the name of O. W. Shipman, the Straitsville Coal Company, this plaintiff, and J. S. Doe & Co. entered into a contract, of which the following is a true copy, to wit:

"O. W. Shipman, Straitsville Coal Co., Straitsville Central Mining Company, and J. S. Doe & Co. agree with each other as follows:

Shipman agrees to represent the entire interests and sales of the coal of the other three parties aforesaid in the trade that may be denominated the Detroit trade by rail or by vessel to Detroit or to and through Detroit, Michigan; that he will confi*r*m himself to the use and handling of their coal alone in all his sales of soft coal for whatever use or purpose or market, taking the same from them in equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he — take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such in-
82 crease himself than shall be his fair proportion thereof, and that he will keep his books, sales, and contracts of coal all open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said Shipman under this agreement, and that they will aid and encourage the trade of said Shipman in all lawful ways in their power so

long as he shall confirm his sales and operations in soft coal to the product of their mines.

Given under our hands this 24th day of June, A. D. 1879.

O. W. SHIPMAN.
STRAITSVILLE COAL CO.,
By JNO. D. MARTON, *P't.*
STRAITSVILLE CENTRAL MINING CO.,
By C. B. PFAHLER, *Gen. Ag't.*
J. S. DOE & CO."

That at the date of the execution of said contract, to wit, June 24, 1879, it was expressly agreed and understood by, between, and among the parties thereto that any and all other coal contracts existing between said Shipman and either or any of said three other parties were thereby and in consideration thereof cancelled and at an end, and the agreement above copied superseded by its terms and provisions all other coal contracts between or among said parties relating to the trade therein specified, was wholly inconsistent with the existence of such other contracts, and was the only agreement or arrangement then in force between and among the parties thereto aforesaid; that by the terms of said agreement this plaintiff undertook and bound itself to furnish one-third of the coal called for thereby, and no more, at the market price of such coal for the time being at their mines, except so
83 far as said Shipman's then present trade and orders were concerned, which were to be filled at the price to him of seventy cents per ton at the mines, each of said three parties furnishing one-third of the coal necessary therefor; that this plaintiff furnished and delivered to said defendant the coal by it furnished and delivered to him between said 1st day of October, 1879, and said 28th day of May, 1880, mentioned in its account to the petition herein attached, being the only items of said account in anywise put in issue or disputed by defendant under the terms and conditions of said contract of date of June 24th, 1879, and no other, so far as express agreement between them was operative or of any force and effect; that any other coal embraced in said account was sold and delivered or orders from said defendant under implied contract to pay therefor what the same was reasonably worth in the market at the several times of sale; that this plaintiff fully performed the conditions of said contract on its part to be performed and fulfilled.

Whereupon said plaintiff prays judgment as in its petition herein.

THE STRAITSVILLE CENTRAL MINING CO., *Plaintiff*,
By J. T. HOLMAN, *Its Att'y.*

UNITED STATES OF AMERICA, *Eastern Division, Southern District of Ohio,* } *ss:*

Edwin A. Cole, being first duly sworn, says that he is the secretary of The Straitsville Central Mining Company, plaintiff,
84 duly authorized in the premises; that the statements contained in its foregoing reply are true, as he verily believes; and further says not. EDMUND A. COLE.

Sworn to before me and subscribed in my presence by said Edmond A. Cole this 20th day of Dec., 1882.

—— SMITH,
Notary Public in and for the County of Franklin, State of Ohio. [SEAL.]

And afterwards, to wit, on the 18th day of June, 1883, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal A, p. 253.

On motion, made by the defendant's attorney and consented to by the plaintiff's attorney, it is now ordered by the court that this cause and the issue therein be, and the same are hereby, referred for trial to Hon. Richard A. Harrison, a master commissioner of this court, who is hereby directed to report the testimony, with his findings of fact and of law, separately stated, to this court without unnecessary delay.

And afterwards, to wit, on the — day of Dec., 1884, the following finding of facts, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

THE STRAITSVILLE CENTRAL MINING CO.
vs.
O. W. SHIPMAN.

85 MARTIN & DOE
vs.
THE SAME.

J. S. DOE & CO.
vs.
THE SAME.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio, eastern division:

In the above causes, which stand referred to me, I submit the following findings of fact and the questions of law arising thereon for the instruction of your honors, an answer to said questions being unnecessary to the determination of said several causes:

On and for some years prior to June 24, 1879, the respective plaintiffs in these actions were the separate and several owners and operators of coal mines in the Hocking valley of Ohio.

For some years prior and up to June 24th, 1879, the defendant Shipman had been extensively engaged in the business of buying and selling coal in the Detroit market and had from time to time purchased considerable coal for that market from said Straitsville Central Mining Co.

Said Martin & Doe and J. S. Doe & Co. had also prior to June 24, 1879, established a coal office in Detroit and competed with Shipman for the Detroit trade.

On the 24th of June, 1879, the three parties plaintiff and Shipman made and entered into a contract in writing of that date; a
86 copy of which contract is set out in the reply of the Straitsville Central Mining Co.

At the date of this written contract and for some time before and since then there existed at Detroit an usage or custom among coal dealers and their larger customers to make contracts for the sale and delivery of coal at a stipulated price for the year next ensuing, and this usage or custom was known to all the parties to these actions when they entered into said contract of June 24, 1879.

At the date of said contract of June 24, 1879, the market price of lump coal was 70 cents and of nut coal 25 cents per ton at the mines in the Hocking valley.

After the execution of said contract of June 24, 1879, the plaintiffs respectively shipped coal to Shipman at Detroit and to his customers on his orders, and separate accounts were kept both by Shipman and the plaintiffs, respectively, of the coal shipped by each of the plaintiffs.

For the coal so shipped by the plaintiffs, respectively, monthly bills were rendered by them respectively to Shipman, in which bills they charged for all coal shipped prior to October 1, 1879, at the rate of 70 cents for lump and 25 cents for nut coal per ton at the mines, and for all coal, both lump and nut, shipped after October 1st, 1879, bills were rendered to Shipman at the market price, which was largely in excess of 70 cents for lump and 25 cents for nut coal at the mines.

87 After having found the foregoing facts the defendant's counsel requested the finding of additional facts; some of which I find as follows:

1. At the time of the making of the alleged contract of June 2, 1879 (set up in the reply of the Straitsville C. M. Co.), no mention was made of the alleged May contract, and there is no evidence to show that either the Straitsville Coal Co., Martin & Doe, or J. S. Doe & Co. knew or had been informed of the alleged May contract.

2. The price of coal went up above 70 cents for lump and 25 cents for nut, per ton, at the mines along in July and August, 1879, but the rise was small and the exact advance does not appear from the evidence.

3. In the account rendered in August, 1879, by the Straitsville Central Mining Company one item is as follows:

"1,323 tons lump, E. I. Co., 75c., $992.25;" and the defendant in his letter, "Exhibit 5," called the attention of the company to the fact, and the company in its September account credited the defendant "By 5c. per ton overcharge on 1,323 tons, E. I. Co., Aug., $66.15."

4. The capacity of the Straitsville Central Mining Co. of mining coal largely exceeded that of either of the other companies to the alleged contract of June 24, 1879, or of both the other companies combined.

5. On the day the alleged contract of June 24th, 1879, was made and at the time Martin & Doe sold out their business at Detroit to

the defendant, *and* J. S. Doe & Co. and Martin & Doe entered
88 *entered* into a contract with the defendant to withdraw from the Detroit market; which contract is in evidence and marked Exhibit 41.

The plaintiff's counsel also requested additional facts to be found; some of which I find as follows:

1. In the orders given by Shipman to the Straitsville Central Mining Co. for coal he did not state at what price the coal was to be furnished to him.

2. There were some contracts and orders for coal binding on Shipman June 24, 1879, but the evidence does not show how many and what they were, excepting that Oct. 18, 1879, he had a written contract with Eureka Iron Co. based on 70c., one with Detroit Bridge and Iron Co. for 600 tons at same figures, and one with Detroit Car Spring Co. for 2 cars per week, same figures, and with three other parties for about 10 cars per week at the same price; these were all.

3. There is no reference to the alleged May contract in his letters put in evidence by the Straitsville Central Mining Co. in relation to coal from June 10, 1879, to May 7, 1880 (the letters being about thirty in number), except the reference contained in the letter of Nov. 14, 1879, which is made a part of these findings.

4. The letters and exhibits in evidence show that separate orders were given by Shipman on plaintiffs for coal, and separate bills were rendered by plaintiffs for coal shipped on such orders.

89 *Questions of Law Arising upon the Foregoing Facts.*

1. Does the written contract of June 24th, 1879, operate to annul or suspend the contract alleged by Shipman in his amended answer in the Straitsville Central Mining Co. case to have been made between him and that Co. on the 28th of May, 1879, neither Martin & Doe nor J. S. Doe & Co. being parties to the alleged May contract?

2. Is the written contract of June 24th, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?

3. What is the meaning of the clause in the contract of June 24, 1879, in these words:

"That he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines."

(1.) Does it mean that three companies should furnish coal at 70c. per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

Or (2) does it mean that they should furnish coal at 70c. per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

Or (3) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman had and might thereafter make, before the market price of coal advanced, with parties who had previously been customers of his?

Or (4) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman then had and might thereafter make, before the market price of coal advanced, with any party, whether previously a customer of his or not?

90 4. Viewing all the provisions of the contract, as well the above-quoted provisions as the others, were the three companies required to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal in Detroit at the time Shipman made such contracts and not at the market price at the time such coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts?

5. Was the contract of June 24, 1879, terminable at the will of either party?

If the parties did not agree as to their respective rights and liabilities under the contract after the market price of coal rose greatly in October, 1879, would such disagreement terminate the contract?

Respectfully submitted.

R. A. HARRISON,
Special Master Com'r.

And afterwards, to wit, on the 12th day of October, 1885, the following answers to questions were filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO.
against
OZIAS W. SHIPMAN.

R. A. Harrison, special master commissioner:

91 The court has considered the questions submitted by you on the above-entitled action and returns answer as follows:

Quest. 1. Does the written contract of June 24, 1879, operate to *the* annul or separate the contract alleged by Shipman in his amended answer in the Straitsville Central Mining Co. case to have been made between him and that Co. on the 28th day of May, 1879, neither Martin & Doe nor J. S. Doe & Co. being parties to the alleged May contract?

Ans. It does.

Q. 2. Is the written contract of June 24, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?

Ans. Testing the question by the nature of the interest of the parties who contracted with Shipman, the contract should be held to be several, and it is so construed by the court.

Q. 3. What is the meaning of the clause in the contract of June 24, 1879, in these words: "That he will turn in all his present trade and orders on their coal at the price of 70 cents per ton at the mine"?

(1.) Does it mean that the three companies should furnish coal at 70 cents per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

Or (2) does it mean that they should furnish coal at 70 cents per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

Or (3) does it mean that they should furnish coal at 70 cents at the mines to fill all contracts which Shipman then had and might thereafter make before the market price of coal advanced with parties who had previously been customers of his?

92 Or (4) does it mean that they should furnish coal at 70 cts. at the mines to fill all contracts which Shipman then had and might thereafter make before the market price of coal advanced with any party, whether previously a customer of his or not?

Ans. The clause quoted includes all contracts and orders which Shipman then had, whether for the immediate or for the future delivery of coal. It does not bind the three companies to fill contracts made by Shipman subsequently to June 24, 1879, at 70c. per ton at the mines.

Q. 4. Viewing all the provisions of the contract, as well the above-quoted provisions as the others, were the three companies required to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal in Detroit at the time Shipman made such contracts and not at the market price at the time such coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts?

Ans. The three companies were bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time Shipman made such contracts and not at the market price at the time of the delivery of such coal by the companies to Shipman from time to time during the existence of such contracts.

Q. 5. Was the contract of June 24, 1879, terminable at the will of either party? If the parties did not agree as to their respective rights and liabilities under the contract after the market price of coal rose greatly in October, 1879, would such disagreement terminate the contract?

Ans. The contract of June 24, 1879, was terminable at the
93 will of either party, subject to the obligation of the companies to deliver and of Shipman to receive coal for the completion of time contracts then in existence, but the failure of the parties to agree as to their respective rights and *to*abilities under the contract would not operate to terminate the contract. The contract of June 24, 1879, was a contract of agency in the nature of a *del credere* commission. It was several for the reason that the interests of the three companies in the subject-matter of the contract were several and the terms of the contract not such as to require that it

be construed as a joint contract. (Chitty on Contracts, 11th Am. ed., 139 and 1341 *et seq.*)

The agent had a right to make contracts in good faith for future delivery in accordance with the custom or usage of the coal trade at Detroit, and such contracts were binding upon the three companies until their completion.

GEO. R. SAGE.
E. S. HAMMOND.

94 And afterwards, to wit, on the 21st day of December, A. D. 1885, an order was made upon the order book of said court clothed in the words and figures following, to wit:

Order Book A, p. 54.

On motion of the defendant, leave is granted him to file a second amended answer herein upon the terms following, the testimony before the master having been closed: That no further testimony be taken in this action by said defendant except such as may become necessary and proper by reason of any new or additional testimony which may hereafter be taken by the plaintiffs in this action. It is also ordered that the defendant shall pay all the costs hereafter incurred in the taking of additional testimony made necessary by the filing of a reply by plaintiffs to defendant's said amended answer or by the filing of said amended answer.

The plaintiffs have leave to reply to the said second amended answer within 30 days after the filing thereof.

And afterwards, to wit, on the 21st day of December, A. D. 1885, the following second amended answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Second Amended Answer.

United States Circuit Court for the Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENT. MIN. CO. }
vs. } Second Amended Answer.
OZIAS W. SHIPMAN, Defendant. }

95 And now comes the defendant, Ozias W. Shipman, and for his second amended answer to plaintiff's petition herein, by leave of the court first had and obtained, says that having been advised and instructed that the contracts of June 24, 1879, between him and the plaintiff and two other parties set out and stated by the plaintiff in its reply to the defendant's amended answer herein, supersedes and takes the place of the contract of May 28, 1879, set out and stated in his amended answer, he avers the fact so to be and now makes his claim and defense in this action upon the said contract of June 24, 1879, which he says was made as stated by plaintiff in its said reply. Defendant says that under and by said June contract plaintiff is entitled to receive and defendant required

to pay seventy cents per ton for lump and twenty-five cents per ton for nut for all the coal sold and delivered by plaintiff to defendant to supply all contracts made by him with outside parties based on such prices, and no more, and for all other coal delivered by plaintiff to him the market price for coal at the time of the delivery thereof, less, in case of an advance in the price of coal, his fair proportion of such increase price, which he says is one-half thereof.

Defendant says that 32,784.70 tons of lump coal and 4,257.80 tons of nut coal delivered by plaintiff to him after the first day of October, 1879, & before the 31st day of May, 1880, under said June contract, were required to supply contracts made by him based upon said prices of seventy cents per ton for lump and twenty-five cents per ton for nut and were so applied by him, and he denies
96 all or any right in the plaintiff to charge or receive any larger price therefor or any greater price for the residue of the coal delivered by plaintiff to him than the market price of such coal at the time of its delivery less one-half of the excess above seventy cents per ton for lump and twenty-five cents per ton for nut coal, and he disputes all the items in plaintiff's said account in which *are* charged an excess of the prices aforesaid to the extent of such excess.

Defendant says that instead of $10,921.11, as stated in his said amended answer, he *was* paid and advanced to the plaintiff $16,538.93 in excess of the price and value of all the coal delivered by plaintiff to him, and that by reason thereof there is due to him from the plaintiff the sum of $16,538.93 on said account for coal sold and delivered by plaintiff to him and monies paid and advanced by him to plaintiff, for which amount he asks a judgment against the plaintiff, with interest thereon from the first day of August, 1880.

By J. N. DEXTER,
HOFFMAN & HOFFMAN AND
DEWITT AND HOFFMAN,
His Attorneys.

United States Circuit Court for the Southern District of Ohio,
Eastern Division, *ss:*

R. C. Hoffman, being sworn, says that he is one of the attorneys of the above-named Ozias W. Shipman, duly authorized in the premises; that the said Ozias W. Shipman is not a resident of said State of Ohio and is absent therefrom, and that the facts stated and allegations in the foregoing pleading of said Ozias W. Shipman are, as affiant believes, true.

R. C. HOFFMAN.

97 Sworn to before me by said R. C. Hoffman and signed by him in my presence this 15th day of December, 1885.

THOMAS CORWIN,
Dep. Clerk U. S. Circuit Court, S. D. O. [SEAL.]

[On margin:] O K. J. W. F. C.

And afterwards, to wit, on the 22nd day of May, A. D. 1886, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO., Plaintiff,
against
OZIAS W. SHIPMAN, Defendant.

Reply to Second Amended Answer.

In reply to the defendant's second amended answer filed Dec. 21, 1885, the plaintiff says:

Reply I. The plaintiff denies that under and by said June contract the plaintiff was bound, as agreed, to deliver to the defendant any nut coal at twenty-five cents per ton or lump coal at 70c. per ton for all the coal to supply all contracts made by the defendant with outside parties based on such prices.

The plaintiff denies also "that 32,784.70 tons of lump coal and 4,257.80 tons of nut coal delivered by plaintiff to him (de-
98 fendant) after the first day of October, 1879, and before the 31st day of May, 1880, * * * were required to supply contracts made by him based upon said prices of seventy cents per ton for lump and twenty-five cents per ton for nut, and were so applied by him."

By the terms of said June contract the defendant was to take, in equal quantities from the plaintiff and the two other companies parties to said contract, the coal he was to take under said contract, and plaintiff furnished to the defendant prior to the 1st day of October, 1879, more than 3,500 tons of said coal in excess of the plaintiff's one-third of the whole quantity of coal the three companies parties to said June contract were bound to furnish to the defendant under said contract, and said quantity thus furnished by the plaintiff to the defendant prior to said 1st day of October, 1879, was at a price not exceeding seventy cents per ton at the mines, as charged in plaintiff's said account, and said 3,500 tons excess of coal and also the coal delivered by plaintiff to defendant after October 1st, 1879, were so delivered by plaintiff and accepted by defendant, to be paid for by defendant at the current market prices at the respective dates of delivery, as charged in said account of the plaintiff.

Reply II. After the advance in the market price of coal subsequent to October 1st, 1879, the plaintiff and the defendant from time to time agreed upon the price to be charged by the plaintiff and to be paid by the defendant for the coal delivered to him by the plaintiff after said 1st day of October, 1879, and covered by said account after that date, and the prices charged in said account and payments therein credited are in accordance with the prices thus
99 agreed upon as the fair and proper market prices for said coal delivered as aforesaid after October 1st, 1879, and said prices

thus agreed upon and charged in said account are not in excess of the market prices then current.

Reply III. The plaintiff denies that the defendant has paid or advanced to the plaintiff $16,538.93 or any other sum in excess of the price and value of the coal delivered by the plaintiff to the defendant, and denies that there is due to the defendant from the plaintiff said sum of $16,538.93 or any sum whatever on said account for coal sold and delivered by the plaintiff to the defendant or moneys paid or advanced by the defendant to the plaintiff, as stated in said second amended answer.

The plaintiff denies that the defendant is entitled to any proportion or part of the prices of any coal charged in said account at a greater price than seventy cents per ton at the mines.

The provision in said contract for sharing such improved prices is not applicable to coal furnished by the plaintiff to the defendant in excess of the one-third the defendant obligated himself to take from the plaintiff in and by said contract.

Moreover, the advance in the market price of coal was attended by an advance in the cost per ton of mining the coal, which advance in the cost per ton of mining the coal (including dead work) immediately after September, 1879, was as follows:

From 65 cents in September to 80 cents in October, and to $1.00 from November 1st to 10th, inclusive, and to $1.35 from Nov. 10th to 30th, and then falling back to $1.10 from Dec. 1, 1879, to June 30, 1880, which advance in the cost of mining the coal the plaintiff prays may be taken into account in the premises.

100 The coal charged for in said account of the plaintiff was shipped by the plaintiff from its mines in the Hocking valley of Ohio to the defendant at Detroit, Mich., over the railroad of the Columbus, Hocking Valley and Toledo Railroad Company, and the defendant was allowed by said railroad Co. a rebate in the freight charges on all said coal thus shipped, but to what extent and amount the plaintiff is unable to state, but said amount was large, and plaintiff prays that it may be ascertained and taken into account in the premises.

Reply IV. The cause of action on which the defendant in his said second amended answer asks judgment against the plaintiff did not, as to a large part, if not all, of the amount for which said judgment is thus asked, accrue within six years next before said answer was filed.

By the laws of the State of Michigan an action for said cause, when it accrued as claimed by the defendant, could be brought only within six years next after it accrued.

By J. T. HOLMES AND
L. J. CRITCHFIELD,
Plaintiff's Attorneys.

THE STATE OF OHIO, }
Franklin County, } *ss:*

E. A. Cole, being duly sworn, on his oath states that he is secretary of the plaintiff (The Straitsville Central Mining Co.) in the case entitled in the foregoing reply, and that he believes the facts

stated and denials and allegations contained in said reply by said plaintiff to be true.

E. A. COLE.

101 Sworn to by said E. A. Cole before me and signed by him in my presence this 13th day of May, A. D. 1886.

EUGENE LANE, [SEAL.]
Notary Public, Franklin Co., Ohio.

And afterwards, to wit, on the 22nd day of May, A. D. 1886, the following demurrer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY, Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Demurrer.

And now comes the defendant, Ozias W. Shipman, and demurs to the fourth reply of the plaintiff herein for that it does not state facts sufficient to constitute a reply to the second amended answer.

HOFFMAN & HOFFMAN AND
E. L. DE WITT,
Att'ys for the Defendant.

And afterwards, to wit, on the 23rd day of May, A. D. 1886, the following report of R. A. Harrison, master commissioner, was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

102 United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO.
vs.
OZIAS W. SHIPMAN. } No. 23.

Report of R. A. Harrison, Master Commissioner.

This cause was referred to the undersigned, as master commissioner of this court, by the interlocutory order made by consent of parties at the June term, 1883, with directions to report the testimony, together with the master's findings of fact and of law separately stated.

This action is founded upon an account for bituminous coal (lump, nut, and slack) sold and delivered by plaintiff to defendant

from April 30th, 1878, to June 18, 1880, both dates inclusive. The balance claimed by plaintiff to be due to it from the defendant upon said account is $19,564.80, with interest from June 18, 1880.

By his original answer, filed April 7, 1881, the defendant, in his first defense, admits that there is an open account between him and plaintiff, but denies that said account is correctly stated in plaintiff' petition, and avers that there is nothing due from him to the plain tiff.

103 For his second defense, pleaded as a counter-claim, defendant avers that on May 28, 1879, he and plaintiff made a contract by which plaintiff agreed to sell and deliver and did sell to defendant all the coal produced by plaintiff from its Sugar Creek lower-vein coal or so much *of* thereof as defendant should need and require for his coal trade in the State of Michigan for the time of one year from May 28, 1879, at the prices following, to wit:

For lump coal by boat from Toledo, $2.20 per ton.

For nut coal by boat from Toledo, $1.70 per ton.

For lump coal on cars at Detroit, $2.60 per ton.

For nut coal on cars at Detroit, $2.10 per ton.

That from May 28, 1879, to May 28, 1880, defendant needed and required for his said trade all and more coal than was furnished by plaintiff.

Defendant admits that plaintiff's account for coal delivered to him prior and up to October 1, 1879, is correct, but avers that the residue of said account is incorrect because the price of coal therein stated largely exceeds said contract price.

Defendant then avers that he has advanced and paid plaintiff from time to time, on account of coal delivered, large sums of money, exceeding in the aggregate by $4,991.64 the price and value of the coal delivered by plaintiff to him, and he counter-claims this excess from the plaintiff.

By his third defense, pleaded as a counter-claim, defendant avers that, acting under the direction of plaintiff and relying upon said May contract, he made sundry contracts for the sale and de-

104 livery of coal to various parties in Detroit and elsewhere in the State of Michigan, at prices based upon said May contract with the plaintiff, and informed plaintiff of such contracts, and that plaintiff agreed to furnish defendant the coal necessary to fill such contracts, but that from and after October 1st, 1879, plaintiff refused to furnish such coal at the price agreed upon, and defendant was therefore obliged to and did purchase large quantities of coal from other parties at higher prices than those at which plaintiff had agreed to furnish it, to the damage of plaintiff in the sum of $10,000.

On the 29th of November, 1881, plaintiff filed its reply to defendant's original answer, denying all the material averments of the second and third defenses pleaded as counter-claims, and stating in a third paragraph that since the commencement of the action the defendant had become and was entitled to the following credits upon the account sued on, to wit:

1880, June 30.	By am't charged to C. B. Pfaler.....	$60	00
" July 26.	" am't p'd by C. & H. V. R. R. on Shipman's order	302	50
27.	" am't p'd by C. & H. V. R. R. on Shipman's order	5,488	35
" "	" am't p'd by C. & H. V. R. R. on Shipman's order	243	20
" Aug. 30.	" am't p'd by C. & H. V. R. R. on Shipman's order	1,218	85
" Sept. 6.	" am't p'd by C. & H. V. R. R. on Shipman's order	5,705	00
	Total.....	$13,017	90

105 On the 6th of December, 1882, defendant, by consent, filed his amended answer, which is substantially the same as his original answer, except that he increases his counter-claim on account of alleged overpayments from $4,991.64 to $10,921.11, and in his counter-claim for damages on account of plaintiff's failure to furnish coal to fill his contracts he attaches a statement of coal purchased by him for that purpose from other parties, and also a statement of the contracts which he had made for the sale and delivery of coal.

On the 20th of December, 1882, plaintiff filed its reply to defendant's amended answer.

The reply to the first counter-claim is, first, a denial of its material averments, following by the allegations that on the 24th of June, 1879, the defendant and the plaintiff and the Straitsville Coal Company and J. S. Doe & Co. entered into a contract, of which the following is a true copy, to wit:

"O. W. Shipman, Straitsville Coal Co., Straitsville Central Mining Co., and J. S. Doe & Co. agree with each — as follows:

Shipman agrees to represent the entire interest and sales of the coal of the other three parties aforesaid in the trade that may be denominated the Detroit trade by rail or by vessel to Detroit or to and through Detroit, Michigan; that he will confine himself to the use and handling of their coal alone in all his sales of soft coal for whatever use or purpose or market, taking the same from them in
106 equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he — take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof, and that he will keep his books, sales, and contracts of coal open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said Shipman under this agreement, and that they will aid and encourage the trade of said Ship-

man in all lawful ways in their power as long as he shall confine his sales and operations in soft coal to the product of their mines.

Given under out hands this 24th day of June, A. D. 1879.

O. W. SHIPMAN.
STRAITSVILLE COAL CO.,
Per JNO. D. MARTIN, *Pr.*
STRAITSVILLE CENTRAL MIN. CO.,
By C. B. PFAHLER, *Gen. Ag't.*
J. S. DOE & CO."

That at the time of the execution of said contract it was expressly agreed and understood between the parties thereto that any
107 and all other coal contracts existing between said Shipman and either or any of said three other parties were thereby and in consideration thereof cancelled and at an end; that by the terms of said agreement (of June 24, 1879) plaintiff undertook to furnish one-third of the coal called for thereby, and no more, at the market price of such coal for the time being at their mines, except so far as said Shipman's then present trade and orders were concerned, which were to be filled at the price to him of 70c. per ton at the mines, each of said three parties furnishing one-third of the coal necessary therefor; that plaintiff furnished and delivered to defendant the coal by it furnished and delivered to him between said 1st day of Oct., 1879, and said 28th day of May, 1880, under the terms and conditions of said contract of June 24, 1879, and no other, so far as express agreement between them was operative; that any other coal embraced in said account was sold and delivered on orders from said defendant under implied contract to pay therefor what the same was reasonably worth in the market at the several times of sale.

The reply to the second counter-claim in defendant's amended answer denies the material averments thereof, and then sets out the said contract of June 24, 1879, followed by the same averments as then contained in the foregoing reply to the first counter-claim.

Upon the issues made by the foregoing pleadings the cause was referred to the master by the interlocutory order made at the June term, 1883, as first hereinabove stated. The plaintiff thereupon, on the 12th day of October, 1883, took in its behalf the deposi-
108 tion of Lewis Moss, which is herewith filed.

And the defendant thereupon proceeded to take the testimony of Ozias W. Shipman, William H. Wood, Charles D. Standish, D. O. Paige, Frank Beal, William S. Armitage, Charles B. Pfahler, Frank J. Bradley, Edwin A. Wales, in his behalf, at Detroit, commencing on November 1, 1883, and their testimony, comprising 132 pages, is herewith filed, marked "Evidence on behalf of defendant, taken at Detroit, commencing Nov. 1, 1883," and the exhibits referred to in said testimony and offered in evidence are herewith filed, all bearing the stamp of "Herschal Whitaker, U. S. commissioner, Nov. 1, 1883."

And afterwards, in December, 1883, at Columbus, Ohio, the parties proceeded to further examine Ozias W. Shipman, on behalf of

the defendant, and J. D. Lott, Joseph A. Jeffreys, E. A. Cole, Jonas M. McCune, John D. Marton, J. S. Doe, on behalf of the plaintiff, and Ozias W. Shipman, on behalf of defendant in rebuttal.

Which said testimony, comprising 120 pages, is herewith filed, marked "Evidence taken at Columbus," and the exhibits referred to in said testimony and offered in evidence are herewith filed.

Afterwards counsel for the respective parties argued the cause before the master, both orally and in writing.

Whereupon the master, having examined and considered
109 the testimony and arguments of counsel, reported to the court, at December term, 1884, a finding of facts, and submitted to the court questions of law arising thereon for instructions by the court.

Afterwards, to wit, on the 12th of October, 1885, the court handed down and caused to be filed its answers to the questions so submitted by the master.

Afterwards, to wit, on the 21st of December, 1885, the defendant, by leave of the court, filed his second amended answer, alleging that he had been advised that the aforesaid contract of June 24, 1879, superseded and took the place of the contract of May 28, 1879, set up in his original and amended answers, and making his claim and defense upon said contract of June 24, 1879. He avers that under said June contract plaintiff is entitled to only 70 cents per ton for lump and 25 cents per ton for nut coal sold and delivered by it to defendant to supply all contracts made by him with outside parties based on such prices, and for all other coal the market price at the time of delivery, less, in case of an advance in the price of coal, defendant's fair proportion of such increased price, which he avers is one-half thereof.

He avers that 32,784.70 tons of lump coal and 4,257.80 tons of nut coal delivered by plaintiff to him after October 1st, 1879, and before May 31, 1880, under said June contract, were required to supply contracts made by him based upon said prices of 70c. for lump and 25 cents for nut coal per ton, and were so applied by him, and he denies any right in plaintiff to charge any larger price therefor or any greater price for the residue of the coal de-
110 livered by plaintiff to him than the market price of such coal at the time of its delivery, less one-half of the excess above 70 cents for lump and 25 cents for nut.

He avers that instead of $10,921.11, as stated in his amended answer, he has paid and advanced to plaintiff $16,538.93 in excess of the price and value of all the coal delivered by plaintiff to him, and that by reason thereof there is due to him from plaintiff said sum of $16,538.93 on said account for coal sold and moneys paid and advanced, for which sum, with interest from Aug. 1, 1880, he asks judgment against the plaintiff.

On the 22nd of May, 1886, plaintiff, by consent, filed its reply to this second amended answer. Its 1st reply denies that under the June contract it was bound to deliver to defendant any nut coal at 25 cents or lump coal at 70c. per ton for all the coal to supply all contracts made by defendant with outside parties based on such

prices. It denies that 32,784.70 tons of lump and 4,257.80 tons of nut coal delivered by plaintiff to defendant after October 1st, 1879, and before May 31, 1880, were required to supply contracts made by him based on said prices.

Plaintiff then avers that by the terms of said June contract defendant was to take in equal quantities from each of the three companies parties to said contract the coal he was to take under said contract; that plaintiff furnished to defendant prior to October 1, 1879, more than 3,500 tons of said coal in excess of plaintiff's one-third of the whole quantity of coal which the three companies were bound to furnish by plaintiff prior to October 1st, 1879, was
111 at a price not exceeding 70 cents per ton at the mines, as charged in plaintiff's said account.

And that said 3,500 tons excess of coal, and also the coal delivered by plaintiff after October 1st, 1879, was delivered to be paid for at current market prices at the dates of delivery as charged in said account of the plaintiff.

The 2nd reply avers that after the advance in the market price of coal subsequently to October 1st, 1879, plaintiff and defendant from time to time agreed upon the price to be charged to and paid by defendant for the coal delivered to him by plaintiff after said October 1st, 1879, and covered by said account after that date, and that the prices charged in said account and payments therein credited are in accordance with the prices thus agreed upon and are not in excess of the market prices then current.

The 3rd reply denies that defendant has paid $16,538.93 or any sum in excess of the price and value of the coal delivered by plaintiff to him, and denies that anything is due from plaintiff to defendant by reason of said alleged overpayments or advances.

Plaintiff denies that defendant is entitled to any proportion or part of the price of any coal charged in said account at a greater price than 70 cents per ton at the mines, and avers that the provisions in said June contract for sharing such improved price is not applicable to coal furnished by plaintiff in excess of the one-third which defendant obligated himself to take from the plaintiff in and by said contract.

Plaintiff avers that the advance in the market price of coal was attended by an advance in the cost of production.

112 Plaintiff also avers that defendant was allowed by the railroad company over which the coal was shipped to him a large rebate in the freight charges, and that the exact amount of said rebate is unknown to plaintiff.

Plaintiff asks that the increased cost of production of coal and the freight rebates be taken into account in the premises.

The 4th reply avers that the cause of action on which defendant in his said second amended answer asks judgment against plaintiff did not, as to a large part, if not as to all of it, accrue within six years next before said answer was filed, and that by the laws of Michigan an action for said cause could be brought only within six years next after it accrued.

The defendant, on the 22nd of May, 1886, filed a general demurrer to the foregoing 4th reply.

Afterwards, commencing on Feb. 9, 1887, and closing on the 10th day of March, 1887, the plaintiff took the testimony of W. A. Miller and F. B. Everett, and recalled E. A. Cole and J. S. Doe, and the defendant, Ozias W. Shipman, was further examined as a witness in his own behalf.

The said testimony, consisting of 77 pages, is herewith filed, marked "Evidence taken at Columbus, commencing Feb. 9, 1887." The foregoing evidence was taken by agreement of counsel in the above case and also in the case of J. S. Doe & Co. against Shipman, both cases being referred to me at the same time, and it was agreed that so far as competent and relevant in either case the evi-
113 dence so taken should be considered in either case.

The findings of fact reported by the master to the court at the December term, 1884, and the answers of the court filed October 12, 1885, to the questions of law submitted by the master have disposed of most of the questions of law and fact arising in the case.

In order, however, to state the account between the parties it is now necessary to dispose of the defendant's demurrer to the 4th reply of the plaintiff to his second amended answer.

I am of opinion and so decide that said 4th reply is insufficient in law to bar defendant's counter-claim, and that his demurrer thereto is well taken and should be sustained.

The statute of limitations stops running against a set-off at the date of the commencement of the action in which it is pleaded. The date of pleading the set-off is immaterial.

McEwing *v.* James, 36 Ohio St., 152, 154.

It is also necessary to dispose of the defendant's claim to a one-half of the price received for coal in excess of 70 cents per ton for lump and 25 cents per ton for nut when such increased price was received for coal which was not required by defendant to fill outstanding time contracts theretofore made by him.

This claim on the part of Shipman is founded upon that clause of said June contract which is in these words:

114 "He will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof."

I find from the evidence that after October 1st, 1879, the market price of coal advanced from 70 cents for lump and 25 cents for nut to as high as $1.35 for lump and 25 cts. for nut at the mines of the plaintiff, and that there was a corresponding advance in the market price at Detroit.

The evidence does not show what portion, if any, of such advance in the market price, either at the mines or in Detroit, was attributable, either directly or indirectly, to any action on the part of Mr. Shipman.

I find from the evidence that after October 1st, 1879, the cost of production of coal at the mines was also increased, and that the

market price of coal in all other markets that Detroit which were supplied from the Hocking valley of Ohio also advanced.

I find from the evidence that the increase in the market price at Detroit and at the mines was due and owing to the increased cost of production and to general causes affecting the coal trade generally, and was not due or owing to any action on the part of Mr. Shipman.

Furthermore, I am inclined to the opinion that the above-quoted provision in said June contract is too vague, indefinite, and uncertain to be susceptible of enforcement by the court. What is a "fair proportion" of such increase? Is it a half, or a tenth, or a
115 fifth, or some other aliquot part? By what standard can the meaning of these words, as here used, be ascertained? Is his "fair proportion" to be measured by the reasonable value of his services in that regard, or by the proportion of the increase which was the direct result of his efforts?

But I have found that the evidence does not show what proportion, if any, of the increase was due to Shipman's acts, nor does the evidence show what was the reasonable value of any efforts on his part in that reg-rd, and there is no direct evidence showing any such efforts upon his part.

My conclusion is that Mr. Shipman is not entitled to credit for any portion of the increased price above 70 cents for lump coal and 25 cents for nut coal per ton charged to him in plaintiff's account for any coal not required by him to fill outstanding time contracts theretofore made by him.

Plaintiff, in its second reply to defendant's second amended answer, claims that none of the coal which it furnished to defendant after October 1st, 1879, was furnished under said June contract, but that all coal furnished by it after that date was furnished at prices agreed upon from time to time between it and the defendant.

The court hold, in answer to questions submitted to it by the master, that "the contract of June 24, 1879, was terminable at the will of either party, subject to the obligation of the companies to deliver and of Shipman to receive coal for the completion of time contracts then in existence, but the failure of the parties to agree as to their respective rights and liabilities under the contract
116 *contract* would not operate to terminate the contract."

The evidence does not show that either party to that contract ever exercised the right or option to terminate it.

Moreover, it is not claimed by plaintiff in this 2nd reply that the June contract was terminated until after the advance in coal, after October 1, 1879. All of Shipman's time contracts which plaintiff was bound to supply coal to fill were made by him before that date, and under the construction given by the court to that contract, even if plaintiff had after October 1, 1879, terminated the contract, it was still bound to supply coal to fill those contracts at the prices current at the respective dates when said contracts were made.

This would be so unless Shipman assented to the termination of said June contract, and I find from the evidence that he did not assent to such termination of it.

Furthermore, plaintiff in its reply filed December 20, 1882, sets up the said June contract and avers that the coal furnished between October 1st, 1879, and May 28, 1880, was furnished and delivered under the terms and conditions of said contract and no other, so far as express agreements were operative, and Mr. Doe himself testified that all the coal was furnished under said June contract.

I find that the market prices of coal after October 1, 1879, were the prices charged in plaintiff's account for coal delivered after that date, and that plaintiff furnished to defendant the quantities and kinds of coal stated in its account after that date, and that the balance owing from Shipman to plaintiff for coal furnished by plaintiff to him or to his order prior to Oct. 1, 1879, was $3,044.85.

117 I find that Shipman made time contracts for future delivery of coal with the following-named parties at the dates following, to wit:

1. June 24, 1879, with the Detroit Steam Supply Co.
2. " 1, " " Fulton iron engine works.
3. " 2, " " Detroit Car Spring Co.
4. July 10, " " Grand Trunk Railway Co.
5. Sept. 1, " " Detroit, Grand Haven & Milw. R'y Co.
6. July 1, " " Eastern Michigan asylum.
7. July 24, " " Baugh Steam Forge Co.
8. July 10, " " Vail & Cram.
9. " 15, " " Detroit Safe Co.
10. " 1, " " Pullman Palace Car Co.
11. Aug. 1, " " Hammond Standish & Co.
12. July 1, " " U. S. custom-house.
13. Aug. 1, " " Detroit Iron and Brass Mfg. Co.
14. July 10, " " Eureka Iron Co.
15. Aug. 1, " " Detroit Railroad Elevator Co.

I find that the amount of coal required by Shipman each month, commencing October 1, 1879, to fill the above-mentioned contracts was as follows:

	Tons of lump.	Tons of nut.
1879, October	4,049.60	203
" November	3,131.25	361.40
" December	5,986.10	552.60
1880, January	8,264.10	1,285.80
" February	6,080.70	972.95
" March	3,392.75	468.35
" April	959.85	80.60
" May	920.35	332.35

118 I find that during the months last above mentioned plaintiff furnished to the defendant or to his order the following quantities and kinds of coal:

market price of coal in all other markets that Detroit which were supplied from the Hocking valley of Ohio also advanced.

I find from the evidence that the increase in the market price at Detroit and at the mines was due and owing to the increased cost of production and to general causes affecting the coal trade generally, and was not due or owing to any action on the part of Mr. Shipman.

Furthermore, I am inclined to the opinion that the above-quoted provision in said June contract is too vague, indefinite, and uncertain to be susceptible of enforcement by the court. What is a "fair proportion" of such increase? Is it a half, or a tenth, or a
115 fifth, or some other aliquot part? By what standard can the meaning of these words, as here used, be ascertained? Is his "fair proportion" to be measured by the reasonable value of his services in that regard, or by the proportion of the increase which was the direct result of his efforts?

But I have found that the evidence does not show what proportion, if any, of the increase was due to Shipman's acts, nor does the evidence show what was the reasonable value of any efforts on his part in that reg-rd, and there is no direct evidence showing any such efforts upon his part.

My conclusion is that Mr. Shipman is not entitled to credit for any portion of the increased price above 70 cents for lump coal and 25 cents for nut coal per ton charged to him in plaintiff's account for any coal not required by him to fill outstanding time contracts theretofore made by him.

Plaintiff, in its second reply to defendant's second amended answer, claims that none of the coal which it furnished to defendant after October 1st, 1879, was furnished under said June contract, but that all coal furnished by it after that date was furnished at prices agreed upon from time to time between it and the defendant.

The court hold, in answer to questions submitted to it by the master, that "the contract of June 24, 1879, was terminable at the will of either party, subject to the obligation of the companies to deliver and of Shipman to receive coal for the completion of time contracts then in existence, but the failure of the parties to agree as to their respective rights and liabilities under the contract
116 *contract* would not operate to terminate the contract."

The evidence does not show that either party to that contract ever exercised the right or option to terminate it.

Moreover, it is not claimed by plaintiff in this 2nd reply that the June contract was terminated until after the advance in coal, after October 1, 1879. All of Shipman's time contracts which plaintiff was bound to supply coal to fill were made by him before that date, and under the construction given by the court to that contract, even if plaintiff had after October 1, 1879, terminated the contract, it was still bound to supply coal to fill those contracts at the prices current at the respective dates when said contracts were made.

This would be so unless Shipman assented to the termination of said June contract, and I find from the evidence that he did not assent to such termination of it.

Furthermore, plaintiff in its reply filed December 20, 1882, sets up the said June contract and avers that the coal furnished between October 1st, 1879, and May 28, 1880, was furnished and delivered under the terms and conditions of said contract and no other, so far as express agreements were operative, and Mr. Doe himself testified that all the coal was furnished under said June contract.

I find that the market prices of coal after October 1, 1879, were the prices charged in plaintiff's account for coal delivered after that date, and that plaintiff furnished to defendant the quantities and kinds of coal stated in its account after that date, and that the balance owing from Shipman to plaintiff for coal furnished by plaintiff to him or to his order prior to Oct. 1, 1879, was $3,044.85.

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1. June 24, 1879, with the Detroit Steam Supply Co.
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8. July 10, " " Vail & Cram.
9. " 15, " " Detroit Safe Co.
10. " 1, " " Pullman Palace Car Co.
11. Aug. 1, " " Hammond Standish & Co.
12. July 1, " " U. S. custom-house.
13. Aug. 1, " " Detroit Iron and Brass Mfg. Co.
14. July 10, " " Eureka Iron Co.
15. Aug. 1, " " Detroit Railroad Elevator Co.

I find that the amount of coal required by Shipman each month, commencing October 1, 1879, to fill the above-mentioned contracts was as follows:

	Tons of lump.	Tons of nut.
1879, October	4,049.60	203
" November	3,131.25	361.40
" December	5,986.10	552.60
1880, January	8,264.10	1,285.80
" February	6,080.70	972.95
" March	3,392.75	468.35
" April	959.85	80.60
" May	920.35	332.35

118 I find that during the months last above mentioned plaintiff furnished to the defendant or to his order the following quantities and kinds of coal:

	Tons of lump.	Tons of nut.
1879, October	5,104	
" November	2,461	286
" December	5,045	824
1880, January	4,475	827
" February	5,439	793
" March	2,061	338
" April	3,087	879
" May	5,139	634

The court having held and decided, in answer to question 2 submitted to it by the master, that the June contract is several as between Shipman and each of the other parties to it, it follows and I so find and hold that to the extent of one-third of the coal so required by Shipman to fill said contracts the plaintiff must be limited in price to 70 cents for lump coal and 25 cents for nut coal per ton at the mines, and that for the excess of coal so furnished by plaintiff to said Shipman after October 1st, 1879, over and above the one-third of the quantities required by him to fill said contracts the plaintiff is entitled to charge and receive the current market prices from time to time when said coal was delivered, which market prices I have found to be the prices charged in plaintiff's account.

The said June contract does not mention nut coal, but the court, in answer to question 4 submitted by the master, held and
119 decided that "the companies were bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time Shipman made such contracts and not at the price at the time of the delivery of such coal by the companies to Shipman from time to time during the existence of such contracts." The market price of nut coal at the time Shipman made the fifteen time contracts hereinbefore mentioned did not exceed 25 cents per ton at the mines, and under this ruling of the court I think I am bound to limit plaintiff to 25 cents per ton for one-third of the nut coal required by Shipman to fill those contracts.

Plaintiff's counsel makes the point that inasmuch as plaintiff prior to October 1st, 1879, furnished defendant more than one-third of the entire amount of coal required by him to fill said time contracts, it is therefore entitled to the market price for all coal furnished by it after that date.

The court, in answer to question five submitted by the master, ruled that the June contract was a contract of agency, and that the agent had a right to make contracts in good faith, for future delivery, in accordance with the custom or usage of the coal trade at Detroit, and that such contracts were binding upon the three companies until their completion.

The fifteen contracts hereinbefore referred to were made by Shipman in good faith and in accordance with the custom or usage of the coal trade at Detroit, and by them Shipman was required to furnish coal from month to month, and could not furnish the whole quantity contracted for at one time or in any one month.

The plaintiff was bound to furnish one-third of the coal to fill these contracts, and could not, I think, discharge this obligation by delivering coal equal to the whole of such one-third prior to October 1, 1879, but was bound to supply the same from month to month as required by Shipman to fill said contracts.

120

In stating the account between the parties the deductions in price as to the one-third of the coal required by Shipman to fill said time contracts should be made not from the highest or lowest price charged by plaintiff for coal in any one month, but from the average price charged for coal for that month.

The defendant is of course entitled to credit for all payments made by him to plaintiffs.

The foregoing findings furnish the basis upon which the account should be stated between the parties.

A statement of such account is hereto attached and made part hereof, showing a balance of $230.74 due from the defendant to the plaintiff, and for which sum, with interest, at the rate of six per cent. per annum, from the 1st day of August, 1880, plaintiff is entitled to judgment against the defendant, together with a judgment for costs.

R. A. HARRISON, *Master.*

121

O. W. Shipman in % with the Straitsville Cent. Mining Co.

Oct. 1, '79.	To bal. Oct. 1, 1879 } " " " " }	3,044 85	
	" 1,349.86 tons lump coal, @ 70c	944 90	
	" 2,122.14 " " " @ 91.61, average price	1,944 09	
	" freight paid on coal for'd from Toledo, @ 1.75	341 25	
J.	" 1,572 tons f. o. b. vessels at Toledo, 2.25	3,537 00	
	" 60 " coal, extra 1.80	48 00	
Ju	" 1,115 " nut coal as ch'g'd in petition	278 75	
	Cr.		
A	By credits for Oct., 1879, as per % attached to petition		1,908 30
	Bal. to Nov. acc't		8,230 30
		10,138 84	10,138 84

November acc't.

Nov. 1, '79.	To bal. from Oct. acc't	8,230 54	
	" 1,043.75 tons lump coal, @ 70c	730 62	
	" 1,248.25 " " " @ 1.55, average price	1,934 78	
	" 182 tons lump coal f. o. b. vessel at Toledo, 2.60	473 20	
	" 120^{46} tons nut coal, @ 25c	30 11	
	" 178^{54} " " " @ $42\frac{6}{10}$, average price	76 04	
	Cr.		
	By credits for Nov., 1879		5,960 09
	Bal. to Dec. acc't		5,515 20
		11,475 29	11,475 29

122 Dec. acc't.

1879.				
Dec.	1.	To bal. from Nov. acc't	5,515 20	
		" 1,995.36 tons lump coal, @ 70c	1,396 75	
		" 914 " " " f. o. b. vessel at Toledo, 2.65	2,422 10	
		" 2,200.64 tons lump coal, @ 1.30	2,860 81	
		" 184.20 " nut " " .25	46 05	
		" 639.80 " " " " .50	319 90	

Cr.

By 65 tons lump coal, @ 1.30, erroneously ch'g'd to Shipman	.....	84 50
" C. B. Pfahler, bill p'd	.....	13 18
" cash	.....	2,000 00
" our draft paid	.....	1,500 00
Bal. to January acc't	.....	8,963 13
	12,560 81	12,560 81

January acc't.

1880.				
January.		To bal. from Dec	8,963 13	
		" 2,754 $\frac{70}{100}$ tons lump coal, @ 70c	1,928 29	
		" 1,720.30 " " " 12.75 av. price	2,193 38	
		" 182 " slack, 14 cars, @ .75 a car	10 50	
		" 143 " nut, ch'g'd as slack	8 25	
		" 428.60 " " @ .25	107 15	
		" 398.40 " " " .40	159 36	
			13,370 06	

123 February acc't

1880.				
Feb.		To bal. from Jan'y	13,370 06	
		" 2,026.90 tons lump coal, @ 70c	1,418 83	
		" 3,425.10 " " " " 1.25	4,281 37	
		" 326.32 " nut " " .25	81 58	
		" 466.68 " " " " .50	233 34	

Cr.

By 13 tons lump coal billed wrong	.....	16
" cash	.....	3,000
Bal. to March acc't	.....	16,368 9
	19,385 18	19,385 18

March acc't.

March.		To bal. from February	16,368 93	
		" 1,130.92 tons lump coal, @ 70c	791 64	
		" 943.08 " " " @ 1.20	1,131 69	
		" 156.12 " nutt " @ .25	39 03	
		" 181.88 " " " @ .50	90 94	

Cr.

By 13 tons lump coal (billed wrong), @ 1.20	.....	15 60
" cash, sundry rebates paid	.....	12,454 85
" def't paid	.....	1,500 00
Bal. to April acc't	.....	4,451 78
	18,422 23	18,422 23

124 April acc't.

1880.

April.	To bal. from March acc't		4,451 78	
	" 319.95 tons lump coal, @ 70c		223 96	
	" 2,767.05 " " " @ 1.20		3,320 46	
	" 26.86 " nut " @ .25		6 71	
	" 852.14 " " " " .50		426 07	
		Cr.		
	By cash		.....	1,500 00
	Bal. to May acc't		.....	6,928 98
			8,428 98	8,428 98

May acc't.

May.	To bal. from April acc't		6,928 98	
	" 306.78 tons lump coal, @ 70c		214 74	
	" 3,093.22 " " " @ 1.20		3,711 86	
	" 1,739 " " " f. o. b. vessel at Toledo, @ 2.80		4,869 20	
	" 110.78 tons nut coal, @ .25		27 69	
	" 454.22 " " " @ .50		227 11	
	" 69 " " " f. o. b. vessel at Toledo, @ 2.60		144 90	
		Cr.		
	By cash, sundry rebates paid		.....	6,541 45
	" acceptances		.....	3,000 00
	Bal. to June acc't		.....	6,583 03
			16,124 48	16,124 48

June acc't.

June.	To bal. from May acc't		6,583 03	
	" 5,282 tons lump coal, @ 1.20		6,338 40	
	" 654 " nut " @ .50		327 00	
	All delivered before June 18, '80.			
			13,248 43	

125 July acc't.

1880.

July.	To bal. from June acc't		13,248 43	
		Cr.		
June	30. By C. B. Pfahler acc't		.....	60 00
	26. " rebate orders paid by C., H. V. & T. R'y		.....	302 50
	27. " " " " "		.....	5,488 35
	" " " " " "		.....	243 20
Aug.	30. " " " " "		.....	1,218 85
Sept.	6. " " " " "		.....	6,561 93
	9. " " " " "		.....	5,186 51
	To balance acc't		5,812 91	
			19,061 34	19,061 34
	Balance due O. W. Shipman on July acc't		.....	5,812 91
	To coal sold after suit brought and not included in above account		10,939 23	
	Credits after suit brought:			
	By overcharge on coal for June, 5c. per ton on lump		.....	439 00
	By shortage on lake coal, 12[990] tons, @ 2.65		.....	33 12
	" acceptances July 15, 40 days		.....	1,442 00
				1,442 00
				1,442 20
	Allowance		.....	97 26
	To balance acc't		.....	230 74
			10,939 23	10,939 23

There is due the plaintiffs $230.74, with interest from Aug. 1, 1880.

126 And afterwards, to wit, on the 2nd day of June, A. D. 1888, the following exceptions to master's report *was* filed in the clerk's office of said court clothed, in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENT. MIN. CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Exceptions by Defendant to the Report of the Master Herein.

And now comes the defendant, Ozias W. Shipman, and excepts to the report of the master, Hon. R. A. Harrison, in this, to wit:

1st. The defendant excepts to the conclusion of the master that the defendant, "Mr. Shipman, is not entitled to credit for any portion of the increased price above 70 cents for lump coal and 25 cents for nut coal per ton charged to him in plaintiff's account for any coal not required by him to fill outstanding time contracts theretofore made by him."

And the defendant excepts to all the findings and conclusions of the master upon and in regard to that part of the June contract in the words following, to wit, "He will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof," for that there is error in said find-
127 ings and conclusions, and that they are contrary to the law and the evidence of the case.

2nd. The defendant excepts to the findings and conclusions of the master in this, to wit:

"That for the excess of coal furnished by the plaintiff to said Shipman after October 1st, 1879, over and above the one-third of the quantities required by him to fill said contracts, the plaintiff is entitled to charge and receive the current market prices from time to time when said coal was delivered, which market prices I have found to be the prices charged in plaintiff's account," for that there is error in said findings and conclusions and the same is contrary to the law of the case.

E. L. DE WITT AND
R. C. HOFFMAN,
Attorneys for Defendant.

And afterwards, to wit, on the 12th day of June, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 152.

On motion of plaintiff's counsel, the time by which exceptions to the master's report herein may be filed by plaintiff is extended to July 1st, 1888.

The same time is also extended to the defendant to file additional exceptions or modify or amend those already filed herein.

And afterwards, to wit, on the 28th day of June, A. D. 1888, the following exception was filed in the clerk's office of said court,
128 clothed in the words and figures following, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENT. MIN. CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant. } No. 23.

Exceptions by Plaintiff to the Master's Report.

The plaintiff excepts to the report of R. A. Harrison, master herein, in the following particulars, viz:

1st. In finding that all the coal delivered by plaintiff to defendant after October 1st, 1879, was furnished under the contract of June 24, 1879, and in failing and refusing to find that said coal was furnished under special orders and arrangements *in* irrespective of said June contract and at the market price at the time of delivery or as agreed upon or acquiesced in by the parties from time to time.

2nd. In finding that the defendant made the fifteen time contracts for future delivery of coal with the parties and at the dates named in said report, and that the amount of coal required by the defendant each month commencing October 1, 1879, to fill said contracts was as stated in said report, and that the plaintiff was
129 bound by said contract of June 24, 1879, to furnish *one* one-third of said amount of coal under said June contract at the rate of 70 cents per ton for lump and 25 cents per ton for nut coal. Said findings are not sustained by the evidence.

3rd. In stating the account between the parties as if the said time contracts were made for the future delivery of the plaintiff's coal, wher*ever* the master does not expressly find that such was the fact and such finding would not be sustained by the evidence if it had been made or is to be implied.

4th. In finding that although previous to October 1, 1879, the plaintiff furnished to the defendant more than one-third of the entire amount of coal required by him to fill said time contracts, the plaintiff was bound to furnish each month after that date one-third of the entire amount of coal the defendan*y* might require in the particular month to fill said contracts. Such finding is not sustained by the terms of the contract of June 24, 1879, or by the construction put upon it by the court in answer to the master's interrogatories or by the evidence.

5th. In finding that in stating the account between the parties the deductions in price as to the one-third of the coal required by the defendant to fill said time contract should be made not from the lowest price charged each month by the plaintiff in its account, but from the average price charged for coal for the particular month.

6th. In omitting to give the plaintiff the benefit of the increased price for coal allowed to the defendant by the persons and corporations with whom he made some of said time contracts after
130 the advance in the market price of coal at Detroit and at the mines after October 1, 1879, such allowance of increase price being in effect the making of a new contract at the date of such allowance.

7th. In making said findings above excepted to the basis of the account between the parties as stated by the master and in finding the balance due to the plaintiff from the defendant the small sum reported by the master instead of a much larger sum as claimed by the plaintiff.

8th. In failing to find the account attached to the plaintiff's petition the true statement of the prices at which the coal was delivered by the plaintiff and accepted by the defendant.

9th. In other particulars, to be specified at the hearing of exceptions to said report.

By L. J. CRITCHFIELD,
An Attorney for Plaintiff.

June 27, 1888.

And afterwards, to wit, on the 10th day of May, A. D. 1889, the following ruling, &c., was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Ruling by Judge Sage. Applies to All the Cases.

United States Circuit Court, S. D. O., Western Division.

THE STRAITSVILLE CENTRAL MINING CO.
vs.
OZIAS W. SHIPMAN.

The court has reconsidered the answers by the court, filed October 12th, 1885, to the questions submitted by the special
131 master, and, reaffirming the answers to questions 1, 2, and 3, has reached the conclusion, the circuit judge and the district judge concurring, that the answer to the 4th question is wrong, and that the true answer is that, excepting contracts within the designation "present trade and orders," which the contract of June 24, 1879, requires him to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract were not bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but that they were entitled to the market price at the date of the actual sale of said coal by them to Shipman, less his "fair proportion" of any advance in the price, as specified in the contract of June 24, 1879.

The error of the court resulted from the treating the contract of June 24, 1879, as a contract of agency in the nature of a *del credere* commission. That it was not such a contract is clear from the fact that, while Shipman was to pay for the coal the price fixed by the con-

tract, he was to be at liberty to sell at his own prices and for his own account, and, "if a consign*ment* — at liberty, according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent." (Lord Justice Mellish in *Ex parte* White, L. Rep., 6, ch. 403.)

132 The stipulation in the contract of June 24th, 1879, that Shipman would labor to improve the market price of coal, giving to the mining companies the advantage of whatever improvement might be made in the market, asking no greater part of such increase himself than should be his fair proportion thereof, is altogether consistent with the construction above given. The language of the contract is vague and doubtful and its meaning obscure, but we are clear that the provision above, substantially quoted from the contract, does not constitute an agency, although it does entitle Shipman to an abatement of any advance in the market price of coal which will give him his "fair proportion thereof," whatever that may be.

Excepting as they are affected by what has already been said in this opinion, the court sustain's the master's findings in his report— that is to say, the court affirms the 1st, 2nd, 5th, and 6th findings of the master, and as to the 3rd and 4th findings, if counsel cannot agree upon the amount, there will be a recommittal to the master. The correspondence between the parties will probably be found to be, practically, the best guide to a correct determation of Shipman's fair proportion of the advance in market price.

GEO. R. SAGE,
May 10, 1889. *U. S. District Judge.*

And afterwards, to wit, on the 7th day of June, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 191.

133 This day this cause came on to be heard upon exceptions filed by the respective parties to the report of R. A. Harrison, master commissioner, filed herein May 23, 1888, and was argued by counsel. On consideration whereof and reconsideration of the answers by the court filed October 12, 1885, to the questions submitted by said master relating to the construction of said contract of June 24, 1879, the court, reaffirming the answers to questions 1, 2, and 3, has reached the conclusion that the answer to the 4th question is erroneous, and that the true answer is that excepting contracts within the designation "present trade and orders," which said contract of June 24, 1879, requires the defendant to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract of June 24, 1879, were not bound to furnish to the defendant coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time the defendant

made such contracts, but that said three companies, severally, were entitled to the market price at the date of the actual sale of the coal by them to the defendant, and under the clause in said contract "that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof," the court holds the defendant entitled to an abatement to the extent of such "fair proportion" from the improved price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal required by him to fill his contracts for the delivery of the plaintiff's coal to third persons. For the purpose of having that "fair proportion" ascertained, and for the fur-
134 ther purpose of having the master state the account between the plaintiff and defendant in accordance with the court's reconsidered answers to the master's interrogatories relating to the proper construction of said contract of June 24, 1879, this cause is recommitted to said master, who is ordered to report to the court at his earliest convenience, such report to be subject to exceptions by either party, and the decision of exceptions to the original report of said master not hereinbefore disposed of is postponed until the coming in of the report by the master as above ordered.

The defendant excepts to all that part of the foregoing finding, judgment, and orders of the court relating to the conclusion reached by the court that the answer to the 4th question is erroneous, and to the answer hereinabove given thereto.

And afterwards, to wit, on the 13th day of December, A. D. 1889, the following supplemental report was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States Circuit Court, Southern Dist. of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY }
vs.
OZIAS W. SHIPMAN. }

Second or Supplemental Report of Richard A. Harrison, Master Com'r.

This cause having been again referred to the master by the interlocutory order of the court made herein on Friday, the 7th day of June, 1889, the master reports as follows:

135 The court having reconsidered its answers filed October 12, 1885, to the questions submitted by the master relating to the construction of said contract of June 24, 1879, and having reaffirmed the answers to questions 1, 2, and 3, but having reached the conclusion that the answer to the 4th question was erroneous, and that the true answer thereto is as follows: "That, excepting contracts within the designation 'present trade and orders,' which said contract of June 24, 1879, required the defendant to turn in at the price of seventy cents per ton at the mines, the three companies

named in said contract of June 24, 1879, were not bound to furnish to the defendant coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time the defendant made such contracts, but that said three companies severally were entitled to the market price at the date of the actual sale of the coal by them to the defendant, and, under the clause in said contract 'that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof,' the court holds the defendant entitled to an abatement to the extent of such 'fair proportion' from the improved market price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal required by him to fill his contracts for the delivery of the plaintiff's coal to third persons"—the court, for the purpose of having that "fair proportion" ascertained, and for the further purpose of having the master state the account between the plaintiff and defendant in accordance with the court's reconsidered answers to the master's interrogatories relating to the proper construction of said contract of June 24, 1879, did, by said interlocutory order of June 7, 1889, recommit this cause to the master, with directions to report to the court at his earliest convenience.

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Soon after the entry of the interlocutory order last aforesaid the master notified the counsel of the respective parties that if they desired to offer any additional testimony in the case he was ready to take the same at his office in Columbus, Ohio, at such time as might be convenient for all parties.

Whereupon, on August 21, 1889, and November —, 1889, the defendant produced as witnesses before the master William P. Rend, Thaddeus Longstreth, W. B. Brooks, and David Patterson.

And the plaintiff produced as witnesses before the master J. S. Doe and E. A. Cole, each of whom, having been first duly sworn, were examined by counsel before the master and their testimony reduced to writing and signed by them respectively and is herewith returned.

The master, having considered the testimony and argument of counsel, has come to the following conclusions:

The only contracts made by Shipman for future delivery of coal which fall within the designation of the phrase "present trade and orders," as contained in said contract of June 24, 1879, are his contracts with Fulton iron and engine works and Detroit Car Spring Co., respectively.

That the market prices of coal, lump and nut, from time to time were the prices charged in plaintiff's account.

That Shipman's "fair proportion" of the increased market price of coal is one-half of the net increase in the market price of lump coal at the plaintiff's mine over and above what the market price was at the date of said contract of June 24, 1879. The stipulation in that contract as to Shipman's "fair proportion" seems to relate only to an increase in the price of coal of the kind men-

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tioned in the preceding stipulation in the contract relating to Shipman's then "present trade and orders"—that is to say, lump coal.

That inasmuch as the court has held in its said interlocutory order of June 7, 1889, that "the defendant is entitled to an abatement to the extent of such 'fair proportion' from the improved market price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal required by him to fill his contracts for the delivery of the plaintiff's coal to third persons," the account between the parties should now be stated upon the following basis, to wit:

1. For ⅓ of the coal required by Shipman to fill his contracts with Fulton iron & engine works and Detroit Car Spring Co., respectively, he must be charged only seventy cents per ton for lump and twenty-five cents per ton for nut coal.

2. For all the residue of the coal furnished by the plaintiff to Shipman he must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff, and which market price I find to be the prices stated in plaintiff's account, deducting therefrom Shipman's "fair proportion" of the improve-
market price of so much of the lump coal delivered by the
138 plaintiff to him as is equal to the one-third of the lump coal required by him to fill the other thirteen time contracts mentioned in my former report.

3. This "fair proportion" to be so deducted is, as above stated, one-half of the net increase in the market price of lump coal at the mines over and above what the market price was at the mines at the date when the June contract was entered into.

The account stated between the parties upon the foregoing basis is as follows:

After deducting credits to which the defendant became entitled pending the suit there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to Dec. 3, 1889 (the first day of December term, 1889, of this court), the sum of.....		$10,483 07
Upon which sum the defendant is entitled to the following deductions:		
1st. For excess charges in said account over 70 cents per ton for ⅓ of the lump coal required by defendant to fill his said two contracts with the Fulton iron & engine works and the Detroit Car Spring Company, respectively, which excess is.....	$117 51	
2nd. For the amount of defendant's one-half of the net increase in the market price of lump coal.....	648 30	
	$765 81	
Add interest from June 20, 1880, to Dec. 3, 1889.....	434 05	
		1,200 26
Making the bal. due plaintiff Dec. 3, 1889.....		$9,282 81

139 For which sum I find the plaintiff is entitled to judgment against the defendant.

Respectfully submitted.

RICHARD A. HARRISON,
Master Commissioner.

The fees of the master to be fixed by the court.

And afterwards, to wit, on the 14th day of December, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 194.

This cause coming on for hearing on the second or supplemental report of R. A. Harrison, master commissioner, filed herein on the 13th day of December, 1889, and the exceptions thereto, on consideration thereof by the court the exceptions are overruled, and said report and all the matters and findings therein are hereby approved and confirmed, and it is ordered that said findings of said master stand as the findings of the court. It is therefore considered by the court that the said The Straitsville Central Mining Company recover of the said Ozias W. Shipman the said sum of nine thousand and two hundred and eighty-two and $\frac{81}{100}$ dollars (which said master and the court find to be the balance due to said company from said Shipman), with interest from December 3d, 1889, together with the costs of said company herein expended, including the sum of six hundred dollars which the court allowed to said master for his services herein, taxed at $—.

140 And it appearing from the answer of the Columbus and Hocking Valley Railroad Company, garnishee herein, that it was indebted to the said Ozias W. Shipman in the sum of eight thousand and two hundred and four dollars and sixty-six cents, when garnisheed herein, to wit, April 1st, 1881, and which sum the said defendant has had the use of since that date, under arrangements between him and said railroad company, on motion of said The Straitsville Central Mining Co., plaintiff, it is ordered that said The Columbus and Hocking Valley Railroad Company pay said sum of $8,204.66, with interest from April 1, 1881, to the clerk of this court (to be applied on said judgment above herein rendered in favor of said plaintiff) within sixty days from the date of this order, or so much thereof as may be necessary to satisfy judgment and interest thereon and costs, and that said garnishee be thereupon discharged.

The defendant, Ozias W. Shipman, excepted and excepts to the said overruling of his said exceptions to the said second or supplemental report and to the judgment of approval and confirmation of said report.

And the said defendant (1st) excepts to the finding and conclusions of the said Hon. Richard A. Harrison, referee, that the said

defendant is entitled to his "fair proportion" of the increased market price of lump coal only, and that the defendant's "fair proportion" of the increased market price of nut coal is denied him.

2nd. The defendant, Ozias W. Shipman, excepts to the findings and conclusion of the said Richard A. Harrison, referee, that the said defendant's "fair proportion" of the improved or increased market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-third only of the lump coal required by him to fill only the "other thirteen time contracts mentioned in his," the referee's, "former report," and in that the said
141 defendant's said "fair proportion" of the increased market price of coal is limited to so much of the lump coal delivered by plaintiff to him, said defendant, as is equal to the one-third only of the lump coal required by him to fill only said certain thirteen time contracts.

3rd. The defendant excepts to the finding and conclusions of the said Hon. Richard A. Harrison, referee, that for all of the residue of the coal furnished by plaintiff to Shipman, the defendant, after that furnished to defendant by plaintiff to fill his (defendant's) contracts with the Fulton iron and engine works and Detroit Spring Car Company he, the defendant, must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff, whereas he, the said Hon. Richard A. Harrison, referree, should have found that for all the coal, both lump and nut, furnished defendant by plaintiff to fill any and all contracts for coal made by defendant for future delivery to third persons prior to the increased price of coal on November, 1879, the defendant should only be charged the sum of 70 cents per ton for lump and 25 cents per ton for nut coal at the mines.

4th. The defendant, Ozias W. Shipman, excepts to the findings and conclusions of the said Hon. Richard A. Harrison, referee, that in stating the amount between the parties plaintiff and defendant, after deducting credits to which the defendant become entitled pending the suit, there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to December 3, 1889 (the first day of the December term, 1889, of this court), the sum of $10,483.07.

5th. And the defendant, Ozias W. Shipman, excepts to the
142 finding of the said Hon. Richard A. Harrison, referee, that there was due to the plaintiff December 3rd, 1889, the sum of $9,282.81, and for which the plaintiff is entitled to judgment against the defendant.

And afterwards, to wit, on the 7th day of January, A. D. 1890, the following exception was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Exceptions by the Defendant to the Second or Supplemental Report of Hon. Richard A. Harrison, Referee.

And now comes the defendant, Ozias W. Shipman, and makes the following exceptions to the second or supplemental report herein of Hon. Richard A. Harrison, referee, to wit:

1st. The said defendant excepts to the finding and conclusion of the said Richard A. Harrison, referee, that the defendant, Ozias W. Shipman, is entitled to his "fair proportion" of the increased market price of lump coal only, and that the said defendant's
143 "fair proportion" of the increased market price of nut coal is excluded and denied him, the defendant.

2nd. The defendant, Ozias W. Shipman, excepts to the finding and conclusion of the said Hon. Richard A. Harrison, referee, that the said defendant's "fair proportion" of the improved or increased market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-third only of the lump coal required by him to fill only the "other thirteen time contracts mentioned in his," the referee's, "former report," and in that the said defendant's "fair proportion" of the improved or increased market price of coal is limited to so much of the lump coal delivered by the plaintiff to him, said defendant, as is equal to the one-third only of the lump coal required by him to fill only certain thirteen time contracts.

3rd. The defendant, Ozias W. Shipman, excepts to the finding and conclusion of the said Hon. Richard A. Harrison, referee, that for all of the residue of the coal furnished by plaintiff to Shipman, the defendant, after that furnished to defendant by plaintiff to fill his, defendant's, contracts with the Fulton iron and engine works and Detroit Car Spring Company, he, the defendant, must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff—

Whereas he should have found that for all the coal, both lump and nut, furnished defendant by plaintiff to fill any and all contracts made by defendant for future delivery to third persons prior to the increased price of coal in November, 1879, the defendant should only be charged the sum of 70 cents per ton for lump and 25 cents per ton for nut coal.

4th. The defendant excepts to the finding and conclusion of said Hon. Richard A. Harrison, referee, that in stating the ac-
144 count between the parties plaintiff and defendant that after deducting credits to which the defendant became entitled pending the suit there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to December 3rd, 1889 (the first day of December term, 1889, of this court), the sum of $10,483.07; and

5th. The defendant excepts to the finding of the referee that there was due the plaintiff December 3, 1889, the sum of $9,282.81, and for which the plaintiff is entitled to judgment against the defendant.

OZIAS W. SHIPMAN,
By E. L. DE WITT,
R. C. HOFFMAN AND
J. N. DEXTER, *His Att'y-*.

And afterwards, to wit, on the 22nd day of January, A. D. 1890, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 216.

This day, to wit, January 22, 1890, came the said defendant and presented to the court a bill of exceptions herein and prayed the same be allowed, signed and sealed, and made a part of the record in this case, which was accordingly done on the 22nd day January, A. D. 1890, by the Hon. Geo. R. Sage, judge of the U. S. district court, southern dist. Ohio, sitting in and holding the circuit court in the above-entitled cause, the Hon. Howell E. Jackson, circuit judge, being absent from the district; and the court allows a writ of error to the supreme court, and with a stay of execution upon the filing of a supersedeas bond in the sum twenty-five thousand ($25,000.00) dollars, with good and sufficient security to be approved by the court within ten days from this date.

145 And afterwards, to wit, on the 22nd day of January, A. D. 1890, the following bill of exceptions was filed in the clerk's office of said court, clothed in the words andfigures following, to wit:

Bill of Exceptions.

Circuit Court of the United States, Southern District of Ohio, Eastern Div.

THE STRAITSVILLE CENTRAL MINING CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Defendant's bill of exceptions.

Be it remembered that this cause, together with two others, to wit, J. S. Doe & Co. *vs.* Ozias W. Shipman and Martin & Doe *vs.* Ozias W. Shipman, being at issue in the United States circuit court for the southern district of Ohio, eastern division, was, together with the said other two cases, on the 18th day of June, 1883, duly referred to Hon. Richard A. Harrison, as referee, to hear and determine and to report to the said court his findings of fact and law thereon, and the said referee having at different times between the said last-named date and the 2nd day of December, 1884, heard the allegations of the parties and their witnesses, the said referee duly made his findings of fact upon the said issues as follows, to wit:

To the honorable the judges of the circuit court of the
146 United States for the southern district of Ohio, eastern division:

In the above causes, which stand referred to me, I submit the following findings of fact and the questions of law arising thereon for the instruction of your honors, an answer to said questions being necessary to the determination of said several causes:

On and for some years prior to June 24, 1879, the respective plaintiffs in these actions were the separate and several owners and operators of coal mines in the Hocking valley of Ohio.

For some years prior and up to June 24, 1879, the defendant Shipman had been extensively engaged in the business of buying and selling coal in the Detroit market and had from time to time purchased considerable coal for that market from said Straitsville Central Mining Co.

Said Martin & Doe and J. S. Doe & Co. had also prior to June 24, 1879, established a coal office in Detroit and competed with Shipman for the Detroit trade.

On the 24th of June, 1879, the three parties plaintiff and Shipman made and entered into a contract in writing of that date; a copy of which contract is set out in the reply of the Straitsville Central Mining Co.

At the date of this written contract and for some time before and since then there existed at Detroit an usage or custom among coal dealers and their larger customers to make contracts for the sale and delivery of coal at a stipulated price for the year next ensuing, and this usage or custom was known to all the parties to these actions when they entered into said contract of June 24, 1879.

At the date of said contract of June 24, 1879, the market
147 price of lump coal was 70 cents and of nut coal 25 cents per ton at the mines in the Hocking valley.

After the execution of said contract of June 24, 1879, the plaintiffs respectively shipped coal to Shipman at Detroit and to his customers on his orders, and separate accounts were kept by Shipman and the plaintiffs, respectively, of the coal shipped by each of the plaintiffs.

For the coal so shipped by the plaintiffs, respectively, monthly bills were rendered by them respectively to Shipman, in which bills they charged for all coal shipped prior to October 1, 1879, at the rate of 70 cents for lump and 25 cents for nut coal per ton at the mines, and for all coal, both lump and nut, shipped after October 1st, 1879, bills were rendered to Shipman at the market price, which was largely in excess of 70 cents for lump and 25 cents for nut coal at the mines.

After having found the foregoing facts the defendant's counsel requested the finding of additional facts; some of which I find as follows:

1. At the time of the making of the alleged contract of June 24, 1879 (set up in the reply of the Straitsville C. M. Co.), no mention was made of the alleged May contract, and there is no evidence to

show that either the Straitsville Coal Co., Martin & Doe, or J. S. Doe & Co. knew or had been informed of the alleged May contract.

2. The price of coal went up above 70 cents for lump and 25 cents for nut, per ton, at the mines along in July and August, 1879, but the rise was small and the exact advance does not appear from the evidence.

3. In the account rendered in August, 1879, by the Straits-
148 ville Central Mining Co. one item is as follows: "1,323 tons lump, E. I. Co., 75c., 992.25;" and the defendant in his letter, "Exhibit 5," called the attention of the company to the fact, and the company in its September account credited the defendant "By 5c. per ton overcharge on 1,323 tons, E. I. Co., Aug., $66.15."

4. The capacity of the Straitsville Central Mining Co. for mining coal largely exceeded that of either of the other companies to the alleged contract of June 24, 1879, or of both of the other companies combined.

5. On the day the alleged contract of June 24, 1879, was made and at the time Martin & Doe sold out their business at Detroit to the defendant, *and* J. S. Doe & Co. and Martin & Doe entered into a contract with the defendant to withdraw from the Detroit market; which contract is in evidence and marked Exhibit 41.

The plaintiff's counsel also requested additional facts to be found; some of which I find as follows:

1. In the orders given by Shipman to the Straitsville Central Mining Co. for coal he did not state at what price the coal was to be furnished to him.

2. There were some contracts and orders for coal binding on Shipman June 24, 1879, but the evidence does not show how many and what they were, excepting that October 18, 1879, he had a written contract with Eureka Iron Co. based on 70c., one with Detroit Bridge and Iron Co. for 600 tons at same figure, and one with Detroit Car Spring Co. for 2 cars per week, same figure, and with three other parties for about 10 cars per week at the same price; these were all except the reference contained in the letter of Nov. 14, 1879, which is made a part of these findings.

149 3. There is no reference to the alleged May contract in his letter- put in evidence — the Straitsville Central Mining Company in relation to coal from June 10, 1879, to May 7th, 1880 (the letters being about thirty in number).

4. The letters and exhibits in evidence show that separate orders were given by Shipman on plaintiffs for coal, and separate bills were rendered by plaintiffs for coal shipped on such orders; and these were all the facts found at that time by the said Hon. Richard A. Harrison, referee, and submitted by him to the court for its instructions thereon.

And the said referee thereupon prayed instructions of the court as to the law applicable to the said facts as follows, to wit:

Questions of Law Arising upon the Foregoing Facts.

1. Does the written contract of June 24, 1879, operate to annul or supercede the contract alleged by Shipman in his amended answer in the Straitsville Central Mining Co. case to have been made between him and that Co. on the 28th day — May, 1879, neither Martin & Doe nor J. S. Doe & Co. being parties to the alleged May contract?

2. Is the written contract of June 24, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?

3. What is the meaning of the clause in the contract of June 24, 1879, in these words: "That he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines"?

(1.) Does it mean that the three companies should furnish
150 coal at 70c. per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

Or (2) does it mean that they should furnish coal at 70c. per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

Or (3) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman then had and might thereafter make, before the market price of coal advanced, with parties who had previously been customers of his?

Or (4) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman then had and might thereafter make, before the market price of coal advanced, with any party, whether previously a customer of his or not?

4. Viewing all the provisions of the contract, as well the above-quoted provisions as the others, were the three companies required to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal in Detroit at the time Shipman made such contracts and not at the market price at the time such coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts?

5. Was the contract of June 24, 1879, terminable at the will of either party? If the parties did not agree as to their respective rights and liabilities under the contract after the market price of coal rose greatly in October, 1879, would such disagreement terminate the contract?

Respectfully submitted.

R. A. HARRISON,
Special Master Com.

151 And the said court, on the 12th day of October, 1885, after hearing counsel for the respective parties, made and filed a decision upon the law applicable to the facts aforesaid, as follows, to wit:

Circuit Court of the United States, Southern Dist. of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY
vs.
OZIAS W. SHIPMAN.

R. A. Harrison, special master comm'r:

The court has considered the question- submitted by you to the above-entitled action and return- answer- as follows:

Q. 1. Does the written contract of June 24, 1879, operate to annul or supersede the contract alleged by Shipman in his amended answer in the Straitsville Central Mining Co. case to have been made between him and that Co. in the 28th of May, 1879, neither Martin & Doe nor J. S. Doe & Co. being parties to the alleged May contract?

Ans. It does.

Q. 2. Is the written contract of June 24, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?

Answer. Testing the question by the nature of the interest of the parties who contracted with Shipman, the contract should be held to be several, and it is so construed by the court.

Q. 3. What is the meaning of the clause in the contract of
152 June 24th, 1879, in these words: "That he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines"?

(1.) Does it mean that the three companies should furnish coal at 70c. per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

Or (2) does it mean that they should furnish coal at 70c. per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

Or (3) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman then had and might thereafter make before the market price of coal advanced with parties who had previously been customers of his?

Or (4) does it mean that they should furnish coal at 70c. at the mines to fill all contracts which Shipman then had and might thereafter make before the market price of coal advanced with any party, whether previously a customer of his or not?

Answer. The clause quoted includes all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal. It does not bind the three companies to fill contracts made by Shipman subsequently to June 24, 1879, at 70c. per ton at the mines.

Q. 4. Viewing all the provisions of the contract, as well the above-quoted provisions as the others, were the three companies required to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time Shipman made such contracts and not at the market price at the time such

coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts?

153 Answer. The three companies were bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time Shipman made such contracts and not at the market price at the time of the delivery of such coal by the company to Shipman from time to time during the existence of such contracts.

Q. 5. Was the contract of June 24, 1879, terminable at the will of either party? If the parties did not agree as to their respective rights and liabilities under the contract after the market price of coal rose greatly in October, 1879, would such disagreement terminate the contract?

Answer. The contract of June 24, 1879, was terminable at the will of either party, subject to the obligation of the companies to deliver and of Shipman to receive coal for the completion of time contracts then in existence, but the failure of the parties to agree as to their respective rights and liabilities under the contract would not operate to terminate the contract.

The contract of June 24, 1879, was a contract of agency in the nature of a *del credere* commission. It was several for the reason that the interests of the three companies in the subject-matter of the contract were several and the terms of the contract not such as to require that it be construed as a joint contract. (Chitty on Contracts, 11th Am. ed., 130 & 134 *et seq.*)

The agent had a right to make contracts in good faith for future delivery in accordance with the custom or usage of the coal trade at Detroit, and such contracts were binding upon the three companies until their completion.

GEO. R. SAGE.
E. S. HAMMOND.

154 Thereupon and thereafter, to wit, on the 23rd day of May, 1888, the said referee having further considered the evidence in the case, under the instructions and findings of law by the court as hereinbefore set forth, made and filed his report and further findings of fact and law, and in the said report and findings, among other things, the said referee finds:

"My conclusion is that Mr. Shipman (the defendant) is not entitled to credit for any portion of the increased price above seventy cents for lump coal and twenty-five cents for nut coal not required by him to fill outstanding time contracts theretofore made by him."

To which finding and conclusion the said defendant, Ozias W. Shipman, excepts, and prays that his exception may be signed and sealed and made part of the record of the court.

And the said referee in his said last before mentioned report filed May 23rd, 1888, among other things, further finds: "The court having held and decided, in answer to question two submitted to it by the master, that the June contract is several as between Shipman and each of the other parties to it, it follows, and I so find and hold,

that to the extent of one-third of the coal so required by Shipman to fill said contracts the plaintiff must be limited in price to 70 cents for lump coal and 25 cents for nut coal at the mines, and for the excess so furnished by plaintiff to said Shipman after October 1st, 1879, over and above the one-third of the quantities required by him to fill said contracts, the plaintiff *is* entitled to charge and receive the current market prices, from time to time, when said coal was delivered, which price I have found to be the prices charged in plaintiff's account."

155 To which finding and report the said defendant, Ozias W. Shipman, excepts, and prays that his exception may be signed, sealed, and made a part of the record of the court.

And the said Hon. Richard A. Harrison, referee, in his said report filed herein May 23, 1888, made the following finding of facts, to wit:

I find from the evidence that after October 1st, 1879, the market price of coal advanced from 70 cents for lump and 25 cents for nut to as high as $1.35 for lump and 50 cents for nut at the mines of the plaintiff, and that there was a corresponding advance in the market price at Detroit.

The evidence does not show what proportion, if any, of such advance in the market price, either at the mines or in Detroit, was attributable, either directly or indirectly, to any action on the part of Mr. Shipman.

I find from the evidence that after October 1st, 1879, the cost of production of coal at the mines was also increased, and that the market price of coal in all other markets than Detroit which were supplied from the Hocking valley of Ohio also advanced.

I find from the evidence that the increase in the market price at Detroit and at the mines was due and owing to the increased cost of production and to general causes affecting the coal trade generally, and was not due or owing to any action on the part of Mr. Shipman, nor does the evidence show what was the reasonable value of any efforts on his part in that regard, and there is no direct evidence showing any such efforts upon his part.

The evidence does not show that either party to the contract of June 24, 1879, ever exercised the right or option to terminate it.

156 Mr. Doe himself testified that all the coal was furnished under said June contract.

I find that the market prices of coal after October 1, 1879, were the prices charged in plaintiff's account for coal delivered after that date, and that plaintiff furnished to defendant the quantities and kinds of coal stated in its account after that date, and that the balance owing from Shipman to plaintiff for coal furnished by plaintiff to him or to his order prior to October 1, 1879, was $3,044.85.

I find that Shipman made time contracts for future delivery of coal with the following-named parties at the dates following, to wit:

1. June 24, 1879, with the Detroit Steam Supply Co.
2. " 1, 1879, " Fulton iron & engine works.
3. " 2, 1879, " Detroit Car Spring Co.
4. July 10, 1879, " Grand Trunk Railway Co.
5. Sept. 1, 1879, with Detroit, Grand Haven & Milw. R'y Co.
6. July 1, 1879, with Eastern Michigan asylum.
7. July 24, 1879, with Baugh Steam Forge Co.
8. July 10, 1879, with Vail & Cram.
9. July 15, 1879, with Detroit Soap Co.
10. July 1, 1879, with Pullman Palace Car Co.
11. Aug. 1, 1879, with Hammond Standish & Co.
12. July 1, 1879, with U. S. custom-house.
13. Aug. 1, 1879, with Detroit Iron and Brass Mfg. Co.
14. July 10, 1879, with Eureka Iron Co.
15. Aug. 1, 1879, with Detroit Railroad Elevator Co.

157 I find that the amount of coal required by Shipman each month, commencing October 1, 1879, to fill the above-mentioned contracts was as follows:

	Tons of lump.	Tons of nut.
1879, October	4,049.60	203
" November	3,131.25	361.40
" December	5,986.10	552.60
1880, January	8,264.10	1,285.80
" February	6,080.70	972.95
" March	3,392.75	468.35
" April	959.85	80.60
" May	920.35	332.35

I find that during the months last above mentioned plaintiff furnished to the defendant or to his order the following quantities and kinds of coal:

	Tons of lump.	Tons of nut.
1879, October	5,104	
" November	2,461	286
" December	5,045	824
1880, January	4,475	827
" February	5,439	793
" March	2,061	338
" April	3,087	879
" May	5,139	634

The market price of nut coal at the time Shipman made the fifteen time contracts hereinabove mentioned did not exceed 25 cents per ton at the mines.

158 The fifteen contracts hereinbefore referred to were made by Shipman in good faith and in accordance with the custom or usage of the coal trade at Detroit, and by them Shipman was required to furnish coal from month to month, and could not furnish the whole quantity contracted for at one time or in one month.

And thereafter, to wit, on the 7th day of January, 1889, the said report of the said Hon. Richard A. Harrison, referee, filed May 23rd,

1888, *coming* on to be heard upon the said exceptions thereto and the exceptions filed thereto, and also the exceptions to the said report made by the plaintiff and filed in the case; which exceptions of the plaintiff are as follows, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING CO., Plaintiff,
vs.
OZIAS W. SHIPMAN, Defendant.

Exceptions by Plaintiff to the Master's Report.

The plaintiff excepts to the report of R. A. Harrison, master herein, in the following particulars, viz:

1st. In finding that all the coal delivered by plaintiff to defendant after October 1st, 1879, was furnished under the contract of June 24, 1879, and in failing and refusing to find that said coal was furnished under special orders and arrangements irrespective of
159 said June contract at the market price at the time of delivery or as agreed upon or acquiesced in by the parties from time to time.

2nd. In finding that the defendant made the fifteen time contracts for future delivery of coal with the parties and at the dates named in said report, and that the amount of coal required by the defendant each month commencing October 1, 1879, to fill said contracts was as stated in said report, and that the plaintiff was bound by said contract of June 24, 1879, to furnish one-third of said amount of coal under said June contract at the rate of 70 cents per ton for lump and 25 cents per ton for nut coal. Said findings are not sustained by the evidence.

3rd. In stating the account between the parties as if the said time contracts were made for the future delivery of the plaintiff's coal, whereas the master does not expressly find that such was the fact and such finding would not be sustained by the evidence if it had been made or is to be implied.

4th. In finding that although previous to October 1st, 1879, the plaintiff furnished to the defendant more than one-third of the entire amount of coal required by him to fill said time contracts, the plaintiff was bound to furnish each month after that date one-third of the entire amount of coal the defendant might require in the particular month to fill said contracts. Such findings is not sustained by the terms of the contract of June 24, 1879, or by the construction put upon it by the court in answer to the master's interrogatories or by the evidence.

5th. In finding that in stating the account between the parties the deductions in prices as to the one-third of the coal required by the defendant to fill said time contract should be made
160 not from the lowest price charged each month by the plaintiff in its account, but from the average price charged for coal for the particular month.

6th. In omitting to give the plaintiff the benefit of the increased price for coal allowed to the defendant by the persons and corporations with whom he made same by said time contracts after the advance in the market price of coal at Detroit and at the mines after October 1st, 1879, such allowance of increase price being in effect the making of a new contract at the date of such allowance.

7th. In making said findings above excepted to the basis of the account between the parties as stated by the master and in finding the balance due to the plaintiff from the defendant the small sum reported by the master instead of a much larger sum as claimed by the plaintiff.

8th. In failing to find the account attached to the plaintiff's petition the true statement of the prices at which the coal was delivered by the plaintiff and accepted by the defendant.

9th. In other particulars, to be specified at the hearing of exceptions to said report.

By L. J. CRITCHFIELD,
Attorney for Plaintiff.

June 27th, 1888.

161 And at the hearing of exceptions to said report of the master, by permission of the court, the plaintiff made and urged the further exception that in the answers given by the court to said interrogatories of the master the court erred in treating this contract of June 24, 1879, as a contract of agency in the nature of a *del credere* commission and in holding that said three companies were bound by said contract to furnish to said Shipman coal to fill contracts made by him for future delivery of coal at the market price of coal at Detroit at the time said Shipman made such contracts, and not at the market price at the time of the delivery of such coal by the respective companies to said Shipman from time to time during the existence of such contracts.

Also at said hearing the defendant, by permission of the court, made and urged that the court erred in its answer to the second interrogatory "that the contract should be held to be several and is so construed by the court."

Which exceptions of defendant and plaintiff were heard and duly considered by the court, upon argument of counsel for the respective parties, before the Hon. Howell E. Jackson, circuit judge, and the Hon. Geo. R. Sage, district judge, and the court, having duly considered the same, made and entered its determination and decision as follows, to wit:

U. S. Circuit Court, Southern District of Ohio, E. D.

THE STRAITSVILLE CENTRAL MINING CO.
vs.
OZIAS W. SHIPMAN.

162 The court has reconsidered the answers by the court filed October 12, 1885, to the questions submitted by the special master, and, reaffirming the answers to questions 1, 2, and 3, has

reached the conclusion, the circuit judge and district judge concuring, that the answer to the 4th question is wrong and that the true answer is that, excepting contracts within the designation "present trade and orders," which the contract of June 24, 1879, requires him to turn in at the price — 70 cents per ton at the mines, the three companies named in said contract were not bound to furnish Shipman coal to fill contracts made by him for delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but they were entitled to the market price at the date of the actual sale of said coal by them to Shipman, less his "fair proportion" of any advance in the price, as specified in the contract of June 24, 1879.

The error of the court resulted from the treating the contract of June 24, 1879, as a contract of agency in the nature of a *del credere* commission. That it was not such a contract is clear from the fact that, while Shipman was to pay for the coal the price fixed by the contract, he was to be at liberty to sell at his own price and for his own account, and, "if a consignee is at liberty, according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent." (Lord Justice Mellish in *Ex parte* White, L. Rep., 6, ch. 403.)

163 The stipulation in the contract of June 24, 1879, that Shipman would labor to improve the market price of coal, giving to the mining companies the advantage of whatever improvement might be made in the market, asking no greater part of such increase himself than should be his fair proportion thereof, is altogether consistent with the construction above given. The language of the contract is vague and doubtful and its meaning obscure, but we are clear that the provision above, substantially quoted from the contract, does not constitute an agency, although it does entitle Shipman to an abatement of any advance in the market price of coal which will give him his "fair proportion thereof," whatever that may be.

Excepting as they are affected by what has already been said in this opinion, the court sustains the master's findings in his report—that is to say, the court affirms the 1st, 5th, and 6th findings of the master, and as to the 3rd and 4th findings, if counsel cannor agree upon the amount, there will be a recommittal to the master. The correspondence between the parties will probably be found to be, practically, the best guide to a correct determination of Shipman's fair proportion of the advance in market prices.

GEO. R. SAGE,
United States District Judge.

May 10, 1889.

Whereupon the said defendant, Ozias W. Shipman, duly excepted and excepts to the findings of law by the court, to wit:

"The defendant excepts to all that part of the foregoing finding, judgment, and order of the court relating to the conclusion
164 reached by the court that the answer to the fourth question is erroneous, and to the answer hereinabove given thereto, and prays the court that this his exception may be signed, sealed, and made a part of the record."

Thereupon and thereafter, to wit, on the 13th day of December, 1889, the said referee, under the interlocutory order of June 7, 1889, recommitting the case to him, having further considered the evidence theretofore given in said case and having taken other and further testimony, made and rendered his further findings of fact as follows, to wit:

United States Circuit Court, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY
vs.
OZIAS W. SHIPMAN.

Second or Supplemental Report of Richard A. Harrison, Master Commissioner.

This cause having been again referred to the master by the interlocutory order of the court made herein on Friday, the 7th day of June, 1889, the master reports as follows:

The court having reconsidered its answers filed October 12, 1889, to the questions submitted by the master relating to the construction of said contract of June 24, 1879, and having reaffirmed the answers to the questions 1, 2, and 3, but having reached the conclusion that the answer to the 4th question was erroneous, and that the true answer thereto is as follows:

165 "That, excepting contracts within the designation 'present trade and orders,' which said contract of June 24, 1879, required the defendant to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract of June 24, 1879, were not bound to furnish to the defendant coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time the defendant made such contracts, but that said three companies severally were entitled to the market price at the date of the actual sale of the coal by them to the defendant, and, under the clause in said contract 'that he will labor to improve the market price of said coal, giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof,' the court holds the defendant entitled to an abatement to the extent of such 'fair proportion' from the improved market price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal

required by him to fill his contracts for the delivery of the plaintiff's coal to third persons"—the court, for the purpose of having that 'fair proportion' ascertained, and for the further purpose of having the master state the account between the plaintiff and defendant in accordance with the court's reconsidered answers to the master's interrogatories relating to the proper construction of said contract of June 24, 1879, did, by its said interlocutory order of June 7, 1889, recommit this cause to the master, with directions to report to the court at his earliest convenience.

166 Soon after the entry of the interlocutory order last aforesaid the master notified the counsel of the respective parties that if they desired to offer any additional testimony in the case he was ready to take the same at his office in Columbus, Ohio, at such time as might be convenient for all parties.

Whereupon, on August 21, 1889, and November —, 1889, the defendant produced as witnesses before the master William P. Rend, Thaddeus Longstreth, W. B. Brooks, and David Patterson.

And the plaintiff produced as witnesses before the master J. S. Doe and E. A. Cole, each of whom, having been first duly sworn, were examined by counsel before the master and their testimony reduced to writing and signed by them respectively and is herewith returned.

The master, having considered the testimony and argument of counsel, has come to the following conclusions:

The only contracts made by Shipman for future delivery of coal which fall within the designation of the phrase "present trade and orders," as contained in said contract of June 24, 1879, are his contracts with Fulton iron and engine works and Detroit Car Spring Company, respectively.

That the market prices of coal, lump and nut, from time to time were the prices charged in plaintiff's account.

That Shipman's "fair proportion" of the increased market price of coal is one-half of the net increase in the market price of lump coal at the plaintiff's mine over and above what the market price was at the date of said contract of June 24, 1879.

167 The stipulation in that contract as to Shipman's "fair proportion" seems to relate only to an increase in the price of coal of the kind mentioned in the preceding stipulation in the contract relating to Shipman's then "present trade and orders"—that is to say, lump coal.

That inasmuch as the court has held in its said interlocutory order of June 7, 1889, that "the defendant is entitled to an abatement — the extent of such 'fair proportion' from the improved market price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal required by him to fill his contracts for the delivery of the plaintiff's coal to third persons," the account between the parties should now be stated upon the following basis, to wit:

1. For $\frac{1}{3}$ of the coal required by Shipman to fill his contracts with Fulton iron and engine works and Detroit Car Spring Com-

pany, respectively, he must be charged only seventy cents per ton for lump and twenty-five cents per ton for nut coal.

2. For all the residue of the coal furnished by the plaintiff to Shipman he must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff, and which market price I find to be the prices stated in plaintiff's account, deducting therefrom Shipman's "fair proportion" of the improved market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-third of the lump coal required by him to fill the other thirteen time contracts mentioned in my former report.

3. This "fair proportion" to be so deducted is, as above stated, one-half of the net increase in the market price of lump coal
168 at the mines over and above what the market price was at the mines at the date when the June contract was entered into.

The account stated between the parties upon the foregoing basis is as follows:

After deducting credits to which the defendant became entitled pending the suit there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to Dec. 3, 1889 (the first day of the December term, 1889, of this court), the sum of		$10,483 07
Upon which sum the defendant is entitled to the following deductions:		
1st. For excess charges in said account over 70c. per ton for ⅓ of the lump coal required by defendant to fulfill his said two contracts with the Fulton iron & engine works and the Detroit Car Spring Co., respectively, which excess is	$117 51	
2nd. For the amount of defendant's one-half of the net increase in the market price of lump coal	648 30	
	$765 81	
And interest from June 20, 1880, to Dec. 3, 1889	434 05	
		1,200 26
		$9,282 81

For which sum I find the plaintiff is entitled to judgment against the defendant.

Respectfully submitted.

RICHARD A. HARRISON,
Master Commissioner.

169 The fees of the master to be fixed by the court.

The foregoing finding of fact set out in this bill of exceptions are all facts found in this case by the said Hon. Richard A. Harrison,

referee; and the said report of the said Hon. Richard A. Harrison, referee, are hereby referred to and made a part of this bill.

Whereupon the said defendant, Ozias W. Shipman, duly excepted to the findings—

1st. The said defendant excepts to the finding and conclusion of the said Richard A. Harrison, referee (that the defendant, Ozias W. Shipman, is entitled to his "fair proportion" of the increased market price of lump coal only, and that the said defendant's "fair proportion" of the increased market price of nut coal is excluded and denied him, the defendant), and prays the court that this his exception may be signed, sealed, and made a part of the record.

2nd. The defendant, Ozias W. Shipman, excepts to the finding and conclusion of the said referee (that the said defendant's "fair proportion" of the improved or increased market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-third only of the lump coal required by him to fill only the "other thirteen time contracts mentioned in his" (the referee's) "former report," and in that the said defendant's "fair proportion" of the improved or increased market price of coal is limited to so much of the lump coal delivered by the plaintiff to him, said defendant, as is equal to the one-third only of the lump coal
170 required by him to fill only certain thirteen time contracts), and prays the court that this his exception may be signed, sealed, and made a part of the record.

3rd. The defendant excepts to the finding and conclusion of the said Hon. R. A. Harrison, referee (that for all of the residue of the coal furnished by plaintiff to Shipman, the defendant, after that furnished to defendant by plaintiff to fill his (defendant's) contracts with the Fulton iron and engine works and Detroit Car Spring Company, he, the defendant, must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff)—

Whereas he should have found that for all the coal, both lump and nut, furnished defendant by plaintiff to fill any and all contracts made by defendant for future delivery to third persons prior to the increased price of coal in October, 1879, the defendant should only be charged the sum of 70 cents per ton for lump and 25 cents per ton for nut coal, and prays the court that this his exception may be signed, sealed, and made a part of the record.

4th. The defendant excepts to the finding and conclusion of the referee (that in the account between the parties plaintiff and defendants that after deducting credits to which the defendant became entitled pending the suit there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to December 3, 1889 (the first day of the December term, 1889, of this court), the sum of $10,483.07), and prays the court that this his exception may be signed, sealed, and made a part of the record.

5th. And the defendant excepts to the finding of the referee
171 (that there was due the plaintiff Dec. 3, 1889, the sum of $9,282.81, and for which the plaintiff is entitled to judg-

ment against the defendant), and prays the court that this his exception may be signed, sealed, and made a part of the record.

And thereupon, the report of the said the Hon. Richard A. Harrison, referee, filed Dec. 13, 1889, coming on to be heard by the court upon the foregoing exceptions thereto, the same were by the court overruled and judgment of confirmation of said report was thereupon rendered by the court; to which order and judgment of the court overruling defendant's said exceptions the defendant at the time excepted, and to the judgment of confirmation the defendant at the time duly excepted.

And thereupon tendered in open court this bill of exceptions, which is accordingly allowed, signed, sealed, and ordered filed and made a part of the record in the case; all of which is accordingly done this — day of January, A. D. 1890.

GEORGE R. SAGE,
U. S. District Judge, Southern District of Ohio,
Sitting in and Holding the Circuit Court in the
Above-entitled Cause, the Hon. Howell E. Jackson,
[SEAL.] *Circuit Judge, being Absent from the District.*

Approved:
L. J. CRITCHFIELD, *Att'y.*

Jan'y 16, '90.

172 And afterwards, to wit, on the 24th day of January, A. D. 1890, the following supersedeas bond was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Supersedeas Bond.

173 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

THE STRAITSVILLE CENTRAL MINING COMPANY
vs.
OZIAS W. SHIPMAN.

Know all men by these presents that we, Ozias W. Shipman, as principal, and Daniel J. Compton and Frederick B. Stevens, all of the city of Detroit, Michigan, are held and firmly bound unto the Straitsville Central Mining Company in the sum of twenty-five thousand dollars, to be paid to the said The Straitsville Central Mining Company, its successors and assigns, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of January, 1890.

Whereas the above-named Ozias W. Shipman has taken a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio, eastern division:

Now, therefore, the condition of this obligation is such that if the above-named Ozias W. Shipman shall prosecute his said
174 writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

OZIAS W. SHIPMAN. [SEAL.]
DANIEL J. COMPTON. [SEAL.]
FREDERICK B. STEVENS. [SEAL.]

Sealed and delivered in presence of—
P. M. CAMPBELL.
WALTER S. HARSHA.

The above security is approved.

GEORGE R. SAGE,
District Judge of the United States, S. D. Ohio.

175 STATE OF MICHIGAN, } ss:
County of Wayne, }

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, }

On this 22nd day of January, 1890, before me, the clerk of the circuit court of the United States for the eastern district of Michigan, at the city of Detroit, in said county of Wayne, personally appeared Ozias W. Shipman, Daniel J. Compton, and Frederick B. Stevens, all of the city of Detroit, Michigan, to me known to be the same persons described in and who executed the annexed bond, and severally acknowledged that they executed the same for the uses and purposes therein specified.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court the day and year first aforesaid.

WALTER S. HARSHE,
Clerk U. S. Circuit Court, East. Dist. of Mich.

176 STATE OF MICHIGAN, } ss:
County of Wayne, }

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, }

On this 22nd day of January, 1890, before me, the clerk of the circuit court of the United States for the eastern district of Michigan, at the city of Detroit, in said county of Wayne, personally appeared Daniel J. Compton, who, being duly sworn, deposes and says that he is one of the sureties named in the attached bond; that he is a resident and freeholder in said city of Detroit, and that he is worth the sum of fifty thousand dollars over and above his debts and liabilities that he owes or has incurred.

DANIEL J. COMPTON.

Subscribed and sworn before me this 22nd day of January, 1890.

WALTER S. HARSHA,
[SEAL.] *Clerk U. S. Circuit Court, East. Dist. of Mich.*

177 STATE OF MICHIGAN, } ss:
County of Wayne, }

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, }

On this 22nd day of January, 1890, before me, the clerk of the circuit court of the United States for the eastern district of Michigan, at the city of Detroit, in said county of Wayne, personally appeared Frederick B. Stevens, who, being duly sworn, deposes and says that he is one of the sureties named in the attached bond; that he is a resident and freeholder in said city of Detroit, and that he is worth the sum of five thousand dollars over and above his debts and liabilities that he owes or has incurred.

FREDERICK B. STEVENS.

Subscribed and sworn before me this 22nd day of January, 1890.

WALTER S. HARSHA,

[SEAL.] *Clerk U. S. Circuit Court, East. Dist. of Mich.*

178 STATE OF MICHIGAN, } ss:
County of Wayne, }

UNITED STATES OF AMERICA, } ss:
Eastern District of Michigan, }

On this 22nd day of January, 1890, before me, the clerk of the circuit court of the United States for the eastern district of Michigan, at the city of Detroit, in said county of Wayne, personally appeared Ozias W. Shipman, who, being duly sworn, deposes and says that he is one of the sureties named in the attached bond; that he is a resident and freeholder in said city of Detroit, and that he is worth the sum of fifty thousand dollars over and above his debts and liabilities that he owes or has incurred.

OZIAS W. SHIPMAN.

Subscribed and sworn before me this 22nd day of January, 1890

WALTER S. HARSHA,

[SEAL.] *Clerk U. S. Circuit Court, East. Dist. of Mich.*

179 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court as the same appears of record in the clerk's office of said court in the above-entitled cause.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, Ohio, this 27th day of February, A. D. 1890.

B. R. COWEN, *Clerk,*
By R. C. GEORGI, *Deputy.*

180 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Straitsville Central Mining Company, plaintiff, and Ozias W. Shipman, defendant, a manifest error hath happened, to the great damage of the said Ozias W. Shipman, defendant, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-second day of January, 1890, in the year of our Lord one thousand eight hundred and ninety.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, S. D. O., E. D. No. 23. The Straitsville Central Mining Co. *vs.* Ozias W. Shipman. Writ of error. Filed Jan'y 22d, 1890. B. R. Cowen, clerk.

181 THE UNITED STATES OF AMERICA, *ss:*

To the Straitsville Central Mining Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Ozias W. Shipman is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety.

GEO. R. SAGE,
U. S. District Judge, S. D. O., Sitting & Holding Circuit Court, there being no Circuit Judge or Associate Justice in the District.

182 [Endorsed:] United States circuit court, southern dist. of Ohio, eastern div. No. 23. The Straitsville Central Mining Company *vs.* Ozias W. Shipman. Citation to defendant in error. Filed Feb'y 3rd, 1890. B. R. Cowen, clerk. Received this writ January 31st, 1890. Served the same on the 1st day of February, 1890, by handing a true copy of this writ to L. J. Critchfield, attorney of record, personally. Fees: Service, $2.00; 1 mile, 6c.; copy, 50c. = $2.56. J. H. Simmons, U. S. marshal, by Wm. S. Dresbalk.

183 Supreme Court of the United States.

OZIAS W. SHIPMAN, Plaintiff in Error,
vs.
THE STRAITSVILLE CENTRAL MINING COMPANY, Defendant in Error.

The said plaintiff in error now comes and says that in the foregoing record and proceedings in this cause there is manifest error in this, to wit:

1. The circuit court erred in its answer to the second interrogatory propounded to it by the said the Hon. Richard A. Harrison, referee, to wit, "that the contract of June 24th, 1879, should be held to be several, and is so construed by the court."

2. The said the Hon. Richard A. Harrison, referee, erred in his conclusion that Mr. Shipman, the defendant below, was not entitled to credit for any portion of the increased price above seventy cents for lump coal and twenty-five cents for nut coal not required by him to fill outstanding time contracts theretofore made by him.

3. The said the Hon. Richard A. Harrison, referee, erred in finding and holding that to the extent of one-third of the coal so required by Shipman to fill said contracts the plaintiff must be limited in price to 70 cents for lump coal and 25 cents for nut
184 coal at the mines, and for the excess so furnished by plaintiff to said Shipman after October 1st, 1879, over and above the one-third of the quantities required by him to fill said contracts, the plaintiff is entitled to charge and receive the current market prices from time to time when said coal was delivered, to wit, the prices charged in plaintiff's account.

4. The circuit court erred in its finding, judgment, and order of May 10th, 1889, in all that part thereof relating to the conclusion of the court that the answer of the court of October 12th, 1885, to the fourth question propounded to it by the said the Hon. Richard A. Harrison, referee, was erroneous and in its answer then, May 10th, 1889, given and made to said fourth question.

5. The circuit court erred in its judgment and answer of May 10th, 1889, to the fourth question of the said the Hon. Richard A. Harrison, referee, propounded to the court on the 2nd day of December, 1884.

6. The said the Hon. Richard A. Harrison, referee, erred in his finding and conclusion that the defendant, Ozias W. Shipman, is

entitled to his "fair proportion" of the increased market price of lump coal only, and that the said defendant's "fair proportion" of the increased market price of nut coal is excluded and denied him.

7. The said the Hon. Richard A. Harrison, referee, erred in his finding and conclusion that the said defendant's "fair proportion" of the improved or increased market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-
185 third only of the lump coal required by him to fill only the "other thirteen time contracts mentioned in his" (the referee's) "former report," and in that the said defendant's "fair proportion" of the improved or increased market price of coal is limited to so much of the lump coal delivered by the plaintiff to him, said defendant, as is equal to the one-third only of the lump coal required by him to fill only certain thirteen time contracts.

8. The said the Hon. Richard A. Harrison, referee, erred in his finding and conclusion "that for all of the residue of the coal furnished by plaintiff to Shipman, the defendant, after that furnished to defendant by plaintiff to fill his (defendant's) contracts with the Fulton iron and engine works and Detroit Car Spring Company, he, the defendant, must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff."

9. The said the Hon. Richard A. Harrison, referee, erred in his finding and conclusion "that in the account between the parties, plaintiff and defendant, *that*, after deducting credits to which the defendant became entitled pending the suit, there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to December 3, 1889 (the first day of the December term, 1889, of this court), the sum of $10,483.07."

10. The said the Hon. Richard A. Harrison, referee, erred in his finding and conclusion "that there was due the plaintiff De-
186 cember 3, 1889, the sum of $9,282.81, and for which the plaintiff is entitled to judgment against the defendant."

11. The court erred in overruling the defendant's exception to the finding and conclusion of the said Richard A. Harrison, referee, that the defendant, Ozias W. Shipman, is entitled to his "fair proportion" of the increased market price of lump coal only, and that the said defendant's "fair proportion" of the increased market price of nut coal is excluded and denied him.

12. The court erred in overruling the defendant's exception to the finding and conclusion of the said the Honorable Richard A. Harrison, referee, that the said defendant's "fair proportion" of the improved or increased market price of so much of the lump coal delivered by the plaintiff to him as is equal to the one-third only of the lump coal required by him to fill only the "other thirteen time contracts mentioned in his" (the referee's) "former report," and in that the said defendant's "fair proportion" of the improved or increased market price of coal is limited to so much of the lump coal delivered by the plaintiff to him, said defendant, as is equal to the one-third only of the lump coal required by him to fill only certain thirteen time contracts.

13. The court erred in overruling the defendant's exception to

the finding and conclusion of the said Hon. R. A. Harrison, referee, that for all of the residue of the coal furnished by plaintiff to Shipman, the defendant, after that furnished to defendant by
187 plaintiff to fill his (defendant's) contracts with the Fulton iron and engine works and Detroit Car Spring Company, he, the defendant, must be charged the market price thereof at the mines and at the time it was so furnished by the plaintiff.

14. The court erred in overruling the defendant's exception to the finding and conclusion of the referee that in the account between the parties, plaintiff and defendant, *that*, after deducting credits to which the defendant became entitled pending the suit, there remains due to the plaintiff on the account mentioned in the petition, with interest calculated up to December 3, 1889 (the first day of the December term, 1889, of this court), the sum of $10,483.07.

15. The court erred in overruling the defendant's exception to the finding of the referee that there was due the plaintiff December 3, 1889, the sum of $9,282.81, and for which the plaintiff is entitled to judgment against the defendant.

16. The court erred in its judgment and confirmation of the report of the said the Hon. Richard A. Harrison, referee, in this case, and in rendering judgment thereon.

17. The court erred in rendering judgment in favor of the plaintiff when it should have been given for said defendant.

18. Other errors apparent on the record. Wherefore the said defendant prays that a citation be issued to said plaintiff and
188 that the said judgment be reversed, annulled, and held for naught, and that the defendant may be restored to all things he has lost by reason thereof.

E. L. DE WITT,
Att'y for Pl't'f in Error.

ALFRED RUSSELL,
Detroit, Mich., of Counsel for Pl't'f in Error.

189 [Endorsed:] #23. The Supreme Court of the United States, Washington, District of Columbia. Ozias W. Shipman, plaintiff in error, *vs.* The Straitsville Central Mining Company, defendant in error. Assignment of errors. Filed Jan. 22, 1890. B. R. Cowen, clerk.

Endorsed on cover: Case No. 14,866. S. Ohio C. C. U. S. No. 306. Ozias W. Shipman, plaintiff in error, *vs.* The Straitsville Central Mining Company. Filed September 28, 1891.

JAMES H. McKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 633.

OZIAS W. SHIPMAN, PLAINTIFF IN ERROR,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY,

DEFENDANT IN ERROR.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

J. HOLDSWORTH GORDON,
Counsel for Defendant in Error.

LAW REPORTER PRINT

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 633.

OZIAS W. SHIPMAN, PLAINTIFF IN ERROR,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY,
DEFENDANT IN ERROR.

Now comes the defendant in error and moves the Court to dismiss the writ of error herein, and for ground for dismissal says—

That the transcript of the record was not filed, and the cause was not docketed, during the term to which the writ was returnable, and said writ therefore became and is inoperative.

J. HOLDSWORTH GORDON,
Counsel for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

OZIAS W. SHIPMAN, Plaintiff in Error,
vs.
THE STRAITSVILLE CENTRAL MINING COMPANY, Defendant in Error.
No. 633.

Brief in Support of Motion to Dismiss.

STATEMENT OF FACTS.

This cause comes to this court from the circuit court of the United States for the southern district of Ohio.

On December 14th, 1889, a judgment was entered (on report of a master commissioner) in favor of the plaintiff below, against the defendant below, in the sum of nine thousand two hundred and eighty-two dollars and eighty-one cents ($9,282.81), with interest from December 3rd, 1889, and costs.

A bill of exceptions in the cause was allowed, signed, sealed, and ordered filed by the judge holding said court on the 22nd day of January, 1890, and supersedeas bond filed.

A writ of error was granted in words and figures as follows:

"UNITED STATES OF AMERICA, *ss:*

"The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

"Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court, before you, between The Straitsville Central Mining Company, plaintiff, and Ozias W. Shipman, defendant, a manifest error hath happened to the great damage of the said Ozias W. Shipman, defendant, as by his complaint ap-

pears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the second Monday of October next in the said Supreme Court to be then and there held; and, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

"Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the twenty-second day of January, [illegible], in the year of our Lord one thousand eight hundred and ninety.

"B. R. COWEN,

"*Clerk of the Circuit Court of the U. S., S. D. O.*"

The citation filed in the cause is in words and figures as follows:

"THE UNITED STATES OF AMERICA, *ss:*

"To The Straitsville Central Mining Company, Greeting:

"You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Ozias W. Shipman is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

"Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this twenty-second day of January, in the year of our Lord one thousand eight hundred and ninety.

"GEORGE R. GAGE,

"*U. S. District Judge, S. D. O., sitting and holding Circuit Court, there being no Circuit Judge or Associate Justice in the District.*"

Points and Authorities.

The writ of error granted and dated January 22nd, 1890, is returnable "on the second Monday of October next"—namely, during the October term of 1890. The citation bears the same date and is returnable at the same term.

The transcript of record was received in the clerk's office of the Supreme Court of the United States on the seventeenth day of August, 1891, and the cause was docketed on the twenty-eighth day of September, 1891.

The October term of the Supreme Court of the United States to which the writ of error was returnable ceased in the month of May, 1891, so that when the transcript of record was received, and when the cause was docketed, the October term of 1890 had passed.

It has been held by this court from the earliest date, that if the transcript be not filed, and the cause not docketed, during the term to which it was made returnable, the writ of error becomes inoperative, and the cause will be dismissed on motion. Indeed, if it appears from the record that this court has not acquired jurisdiction of a case for want of proper appeal or writ of error, it will be dismissed, although no motion be made to that end.

In Edmonson *vs.* Bloomshire, 7 Wall., 306 (309), Mr. Justice Miller, delivering the opinion of the court, says:

> "In the case of Villabolos *v.* United States and United States *v.* Curry, decided at the December term, 1847, and especially in the latter case, it was held on full consideration that whether a case was attempted to be brought to this court by writ of error or appeal the record must be filed before the end of the term next succeeding the issue of the writ or the allowance of the appeal, or the court had no jurisdiction of the case. This was repeated in the cases of the Steamer Virginia *v.* West, Meser *v.* United States, and United States *v.* Gomez. In Castro *v.* United States the same question was raised. The importance of the case, together with other considerations, induced the court to consider the matter again at some length. Accordingly, the present Chief Justice delivered an opinion, in the course of which the former cases are considered and the ground of the rule distinctly stated. Other cases followed that, and in Mussina *v.* Cavazos, decided at the last term, the whole doctrine is again reviewed and the rule placed distinctly on the ground that this court has no jurisdiction of the case unless the transcript be filed during the term next succeeding the allowance of the appeal. The intelligible ground of this decision is that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to review the action of the inferior courts; that the writ of error, like all other common-law writs, becomes *functus officio* unless some return is made to it during the term of court to which it is returnable. . . . These principles have received the unanimous approval of this court and have been acted upon in a large number of cases not reported, besides several reported cases not here mentioned; and the court has never hesitated to act on this rule whenever it has appeared from the record that the case came within it, although no motion to dismiss was made by either party. In fact, treating it as a matter involving the jurisdiction of the court, we cannot do otherwise."

And in Caillot *v.* Deetken, 113 U. S., 215, in dismissing the cause, the same Justice says:

> "It has been repeatedly decided by this court that when no return has been made to a writ of error by filing the transcript of the record here, either before or during the term of the court next succeeding the filing of the writ in the circuit court, this court has acquired no jurisdiction of the case and, the writ having expired, can acquire none under that writ, and it must therefore be dismissed."

See also—

Blair *v.* Miller, 4 Dall., 21.
Villabolos *v.* United States, 6 How., 81.
United States *v.* Curry, 6 How, 106.
Steamer Virginia *v.* West, 19 How., 182.
Mesar *v.* United States, 2 Black., 721.
United States *v.* Gomez, 1 Wall., 690.
Castro *v.* United States, 3 Wall., 46.
Mussina *v.* Cavazos, 6 Wall., 355.
Grigsby *v.* Purcell, 99 U. S., 505.
Hewitt *v.* Filbert, 116 U. S., 142.

It is respectfully submitted that in view of the authorities above cited, confirming the uniform practice of this court, the motion made should be granted and the cause dismissed.

J. Holdsworth Gordon,
For Defendant in Error.

157-336

FILED
MAR 26 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States

OCTOBER TERM, 1893.

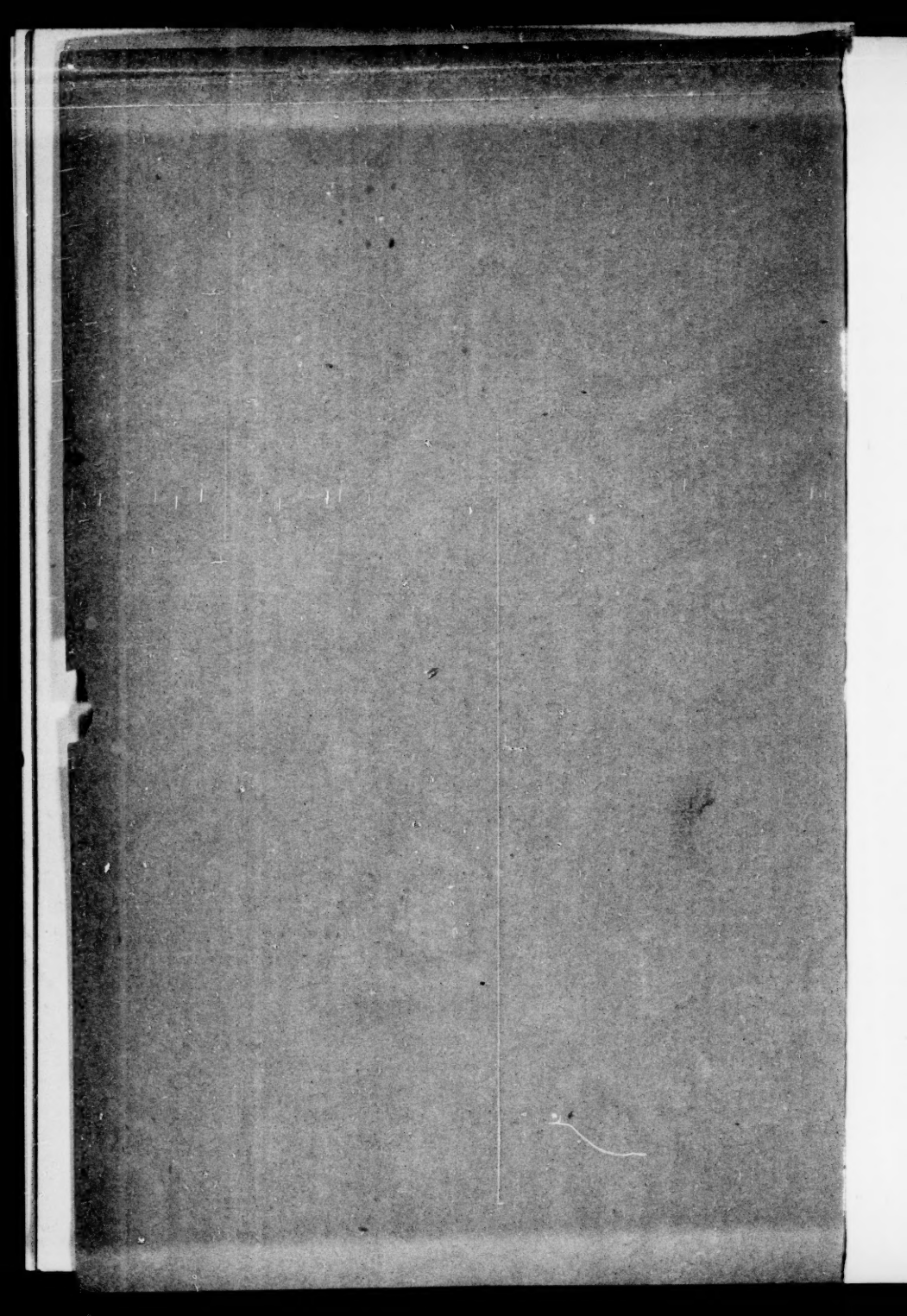
OZIAS W. SHIPMAN,
Plaintiff in Error,
vs.
THE STRAITSVILLE CENTRAL MINING COMPANY.

No. 633.
Error to C. C. U. S., S. D. Ohio, Eastern Division.

Brief Against the Motion to Dismiss Made in March, 1894.

ALFRED RUSSELL,
Counsel for Plaintiff in Error,
DETROIT.

DETROIT:
John F. Eby & Co., Printers.
1894.



Supreme Court of the United States

OCTOBER TERM, 1893.

OZIAS W. SHIPMAN, *Plaintiff in Error,* vs. THE STRAITSVILLE CENTRAL MINING COMPANY.	*No. 633.* *Error to C. C. U. S., S. D. Ohio, Eastern Division.*

Brief Against the Motion to Dismiss Made in March, 1894.

STATEMENT.

1. The defense to this motion to dismiss (made two years and a half subsequent to docketing) rests upon the facts stated in the affidavit of C. P. White, resident deputy clerk U. S. C. C., S. D. Ohio, Eastern Division, at Columbus, Ohio, and in the affidavit of E. L. DeWitt, attorney for Mr. Shipman in the court below, and in the affidavit of Mr. Shipman himself, all of which affidavits are filed in this cause. I print the body of each affidavit showing that the plaintiff in error was guilty of no want of diligence, and that the delay in filing the record was due to an inadvertence of an officer of the court below.

2. The substance of these affidavits is that the plaintiff in error filed his assignment of errors and took out his writ of

error and citation all on the 22d day of January, 1890, and filed his supersedeas bond the 24th day of January, 1890, and caused the citation to be served February 1, 1890, and caused the transcript to be made and certified February 27, 1890, and was informed by his attorney, Mr. DeWitt, that the clerk had sent the transcript to Washington; that, in fact, the clerk sent the transcript (with the original files and testimony) to Columbus (in which division the case originated), to be transmitted from there to Washington; but the deputy at Columbus, in putting away the bulky testimony in the case (sent with the transcript) into a cupboard, by mistake put away also with it the transcript, believing the transcript to have been already sent to Washington, from Cincinnati, and the deputy clerk so informed Mr. DeWitt, attorney for Mr. Shipman, when said attorney inquired. The plaintiff discovered that the transcript had not been sent, because the garnishee, the C., H. V. & T. R. R., notified him in July, 1891, and then plaintiff caused it to be searched for and sent forward, about three months after the return term had elapsed, in May, 1891, the case being filed and docketed by the clerk in August, 1891, and the plaintiff in error then made his deposit and entered his appearance. The defendant in error, although served with the citation February 1, 1890, did not make this motion to dismiss until March, 1894, when a new writ was barred by lapse of time.

AFFIDAVIT OF MR. WHITE, DEPUTY CLERK OF THE COURT BELOW, FILED ON THIS MOTION.

(Title of court and cause and venue.)

C. P. White, being duly sworn, says:

1. That on the twenty-seventh day of February, one thousand eight hundred and ninety, he was and ever since has been, the resident deputy clerk at Columbus, Ohio, of the clerk's office of the United States Circuit Court for the southern district of Ohio, the eastern division.

2. That the above entitled cause was commenced in the eastern division, and that all the papers herein were transmitted from

the clerk's office in the eastern division at Columbus, to the clerk's office in the southern division, in Cincinnati, for the purpose of the hearing of the cause, and that the cause came on to be tried at Cincinnati, before the Honorable George R. Sage, sitting and holding court as circuit judge; and on the fourteenth day of December, 1889, a judgment was rendered in said cause by said judge at Cincinnati against the defendant, Ozias W. Shipman, for the sum of nine thousand two hundred and eighty-two and eighty-one hundredths dollars ($9,282.81), and that on the *twenty-second day of January, one thousand eight hundred and ninety, a bill of exceptions* was duly allowed, signed, sealed and ordered filed by said circuit judge, and was made a part of the record in the cause, being filed at Cincinnati, and that *on the same day*, viz., January 22, 1890, an *assignment of errors* in said cause was duly signed at Cincinnati, and *a writ of error* was duly allowed by said circuit judge at Cincinnati, and a *citation on said day* was duly issued to the plaintiff below, and the said citation was duly returned, *served on the first day of February, 1890*, and was filed at Cincinnati with all the rest of the papers, and on the *twenty-fourth day of January, 1890*, the said defendant, Ozias W. Shipman, *filed his supersedeas bond* in the said clerk's office of the said court at Cincinnati, and the said bond was *duly approved* by the judge of said court.

3. *On the twenty-seventh day of February, 1890*, a complete *transcript* of the record and all the papers in said cause, all of which record and papers were at the clerk's office at Cincinnati, was made out and prepared *and duly certified by the* clerk of said court; that is to say, the principal clerk, Gen. Cowan, and the said clerk of the court (he being the clerk of the southern division and eastern division both, and this affiant being his deputy in the eastern division at Columbus) sent the said transcript of the record, together with the writ of error, the citation, the proof of service thereof, and the supersedeas bond all attached to said record, to this deponent at Columbus, for the purpose of being transmitted to the Supreme Court at Washing-

ton, instead of sending them direct from Cincinnati to Washington, and the said clerk, Gen. Cowan, sent the said transcript of record, writ of error, citation, proof of service thereof, and supersedeas bond to this deponent for the purpose of having this deponent transmit the same to the clerk of the Supreme Court in Washington.

4. *At the same time and with the said transcript of record and accompanying papers, the said clerk, Gen. Cowan, transmitted to this deponent all the written testimony which had been taken in said cause, and which written testimony was not a part of the record of bill of exceptions, and had no connection with the transcript of record and papers attached to it, and said Gen. Cowan also sent to this deponent all the original papers in the cause.*

5. *This affiant took the original papers as received from Gen. Cowan and placed them in the proper file box of this case, No. 23, and this affiant took the written testimony, which was quite bulky, and placed it in the cupboard underneath the file case in this affiant's office, and by mistake, he, together with the written testimony, took the transcript of record with the writ of error, citation, proof of service of it, and supersedeas bond attached, and placed it with the written testimony in the cupboard, wrongly supposing that the said last named papers were a part of the written testimony, and the said transcript of record, writ of error, citation, proof of service and supersedeas bond remained in said cupboard undisturbed until the 7th day of July.*

6. *That by reason of the above mistake, the transcript of record in this cause, together with the writ of error, citation, proof of service and supersedeas bond were not transmitted to the clerk of the Supreme Court at Washington, until this 7th day of August, 1891.*

7. *This affiant received the transcript of record, writ of error, citation, proof of service thereof and supersedeas bond from the clerk at Cincinnati, on the twenty seventh day of February, one thousand eight hundred and ninety (1890), as above stated, and put them away, supposing them to be a part of the testimony as*

above stated, and was under the impression and belief that the transcript, writ of error, citation, proof of service thereof and bond had been sent direct from the clerk's office at Cincinnati to the clerk's office of the Supreme Court at Washington, until the mistake was discovered on the seventh day of July, 1891.

(Usual jurat.) (Signed) C. P. WHITE.

AFFIDAVIT OF MR. DEWITT, ATTORNEY OF PLAINTIFF IN ERROR IN THE COURT BELOW, FILED ON THIS MOTION.

(Title of court and cause and venue.)

E. L. DeWitt, being duly sworn, says he is, and has been from the commencement of the above entitled action in said court, one of the attorneys for the said defendant, Ozias W. Shipman. That on the 14th day of December, A. D. 1889, the said Circuit Court rendered a judgment in said case against the said defendant for the sum of nine thousand two hundred eighty-two and eighty-one hundredths dollars, to which judgment the said defendant duly excepted, and on the 22d day of January, 1890, presented his bill of exceptions therein to the said court, which was duly allowed signed, sealed, and ordered filed and made a part of the record in the case, which was accordingly done. *That on said 22d day of January, 1890, an assignment of errors in said cause was duly filed, and a writ of error in said case was duly allowed, and a citation to the said plaintiff was duly issued, and said citation was duly returned served on the 1st day of February, 1890. On the 24th day of January, 1890, said defendant filed his supersedeas bond in the clerk's office of said court at Cincinnati, duly approved by the judge thereof, and pursuant to the direction of the defendant (below), on the 27th day of February, 1890, a complete transcript of the record in said case was made out and prepared, and certified by the clerk of said court. That said transcript* of the record was prepared and made out in the clerk's office of the said court in the city of Cincinnati, and by the said clerk sent with the other papers and the testimony in

the case to his deputy clerk at Columbus, Ohio, and was by him placed, along with the written testimony, in a closet or cupboard of his office, and the other papers in the case were placed in the file boxes of his office. *This affiant had exclusive charge of the case at the said office in Columbus, and no notice whatever was given to him that said transcript of the record had been sent to the said clerk's office in Columbus, or that it was there. This affiant called at said office in Columbus several times to see if the papers in the case had been received there from the office in Cincinnati, and to examine them and the Appearance Docket, to learn if all things proper and necessary to perfect the proceedings on error had been done, and made inquiries about the transcript of the record, and was informed that it was being made up at the Cincinnati office, and would be sent from there to the United States Supreme Court. After the papers in the case had been received at the clerk's office in Columbus, from the Cincinnati office, this affiant asked for them, and was given all except the testimony and said transcript of the record, and he examined such as was given him, but was informed that the only other papers were the said testimony in the case, and this affiant then understood from said deputy clerk that said transcript of the record had been transmitted to the United States Supreme Court at Washington, and from such information believed that it had been done.*

(Signed) E. L. DeWitt.

(Usual jurat.)

Affidavit of Mr. Shipman, Plaintiff in Error.

(Title of court and cause and venue.)

1. Ozias W. Shipman, coal dealer of Detroit, Michigan, being duly sworn, says that he is the plaintiff in error, and that he caused his bill of exceptions and assignment of error to be filed, and his writ of error and citation to be taken out, and filed his security bond, on or about the twenty-second day of January, 1890, and caused the citation to be served the first day of February, 1890, the writ being returnable at the next October term.

And that affiant, on the twenty-seventh day of February, 1890, caused a transcript of the record to be prepared and certified by the clerk, and that he did this by and through his attorney, E. L. DeWitt, of Columbus, Ohio, and that said DeWitt informed this affiant at the time that the transcript of the record had been transmitted to Washington by the clerk who prepared it, and that this case was regularly in the Supreme Court, and this affiant believed it to be true.

2. Affiant further says that he heard nothing further in the matter until the Columbus, Hocking Valley & Toledo R. R. Co., which was a garnishee, applied to affiant to protect it, in July, 1891, and affiant immediately instituted an inquiry which resulted in finding, to affiant's great surprise, that the transcript had been transmitted by Gen. Cowan, clerk, from the Cincinnati office to the Columbus office, to be sent to Washington from said Columbus (where the case originated), and that the deputy clerk at Columbus had mixed the transcript with the bulky papers of the testimony which he laid away in a cupboard, he supposing the transcript had been sent by Gen. Cowan to Washington.

3. Affiant further says that on discovering the mistake of the clerk, he caused the transcript to be filed and the case to be docketed in August, 1891, entered his appearance and made his deposit about three months after the close of the return term, and that affiant and his attorney have been guilty of no want of diligence in prosecuting the review of this case in the Supreme Court, and that the failure to file the transcript until after the close of the term was solely due to the mistake and inadvertence of the clerk as aforesaid.

(Signed) O. W. Skipman.

(Usual jurat.)

3. It thus appears that the fact that the record was filed after the close of the return term and before the beginning of the succeeding term, was not owing to any laches on the part of the plaintiff in error, but wholly to a curious mistake of the clerk of

the court, which mistake he details in his affidavit. And it also appears that the defendant in error has suffered no injustice. Security for his judgment was duly given. He was duly served with the citation. *The delay in filing from the month of May, 1891, when the return term closed, to the month of August, 1891, about three months, owing to the fault of the clerk below, was of no detriment either to the opposite party or to the court itself.*

Moreover, the defendant himself has been guilty of laches in delaying from August, 1891, till March, 1894, to make this motion, he having been cited in February, 1890.

LAW.

I controvert the position of the counsel for the defendant in error that the court has not *acquired jurisdiction*, because the record was not filed until about three months after the return term.

As observed by Mr. Chief Justice WAITE, in *Grigsby vs. Purcell* (after citing *Edmonson vs. Bloomshire* on which the moving counsel relies in his brief), *bottom* of page 507, 99 U. S.: "*The "real objection is not that this court has no jurisdiction, but "that the plaintiff in error has failed to duly prosecute his suit.*" At the *bottom* of page 506, same case and volume, the chief justice said that the case might be dismissed for not docketing within the return term if no "*sufficient excuse is given for the delay.*"

According to *Grigsby vs. Purcell*, and according to common sense, "*if the plaintiff in error has not himself been guilty of laches or want of diligence*," the case will not be dismissed.

Grigsby vs. Purcell, 99 U. S., 507.

Even in the case of a *supersedeas*, effect can be given by a *nunc pro tunc* order when the delay was the act of the court and not of the parties, and injustice will not be done.

Sage vs. Cent. R. R., 93 U. S., 418, *top*

Subsequently to the case of *Edmonson vs. Bloomshire* (on which the mover relies in his brief), this court denied a motion to dismiss, *although the record had not been filed in this court until about two* (2) *years after the end of the return term*, "BECAUSE THE FAULT OF THE CLERK MAINLY OCCASIONED THE DELAY (p. 426, *11th line from bottom*).

U. S. vs. Vigil, 10 Wall., 423–426.

Mr. J. NELSON in delivering the opinion (on p. 426) observed: "The practice relied upon for the present motion may be admit-"ted (*Edmonson vs. Bloomshire*, 7 Wall., 306), but there are "*exceptions* to the rule; *U. S. vs. Gomez* is an instance. There "* * * *the clerk had refused to return and file the tran-*"*script.*" The facts were regarded as a sufficient excuse for the delay in filing the record at a term subsequent to the return term.

In another case where no bond was given through oversight of *counsel*, and there was no intention to delay the due prosecution of the suit, and no harm had been done, and where, *as in the present case*, the defendants in error delayed their motion to dismiss until a new writ was barred by lapse of time, a motion to dismiss was denied.

Edwards vs. U. S., 102 U. S., 575.

Surely a mistake of the CLERK, whereby he *innocently omits* to file the record which the plaintiff had promptly prepared, is as good an excuse for the plaintiff in error as a refusal of the clerk.

The leniency for which I contend is fully justified by the most recent holding, in the opinion of the present chief justice, in which *Grigsby vs. Purcell* is cited and approved. The behavior of the CLERK is in this recent holding recognized as an excuse. It is also said that (p. 622, *top*) the *court may treat the act of the clerk of this court in docketing the case as providently done.* It is also said (p. 622, *middle*) that *delay in presenting the motion*

o *dimiss "has sometimes been referred to as an element in com-*
"*bination with others justifying leniency* in its disposition."

Green vs. Elbert, 137 U. S., 621.

The extreme technicality which characterized the earlier decisions has been greatly modified in the above cases, it having been perceived by the court that *injustice* was wrought by the former rulings.

Unusual promptitude was shown by the plaintiff in error in this case in carefully observing all the requirements of law; and I earnestly ask the court, in the interest of *justice* to my client, not to visit upon him the unfortunate mistake of the subordinate officer of the court below, and, accordingly, to deny this motion. I may add that on the first hearing of this case the finding was in favor of my client to the amount of thirteen thousand dollars.

ALFRED RUSSELL,
Counsel for Plaintiff in Error,
Detroit.

FILED.
APR 15 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

No. 306.

OCTOBER TERM, 1894 (APRIL, 1895).

OZIAS W. SHIPMAN,
Plaintiff in Error,
vs.
THE STRAITSVILLE CENTRAL MINING COMPANY,
Defendant in Error and Plaintiff Below.

Error to the U. S. C. C. for the S. D., Ohio.

BRIEF FOR PLAINTIFF IN ERROR.

ALFRED RUSSELL,
Of Counsel,
DETROIT.

DETROIT:
John F. Eby & Co., Printers.
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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case involves the construction of a coal contract.

1. The declaration, filed December 6, 1883, in the Common Pleas Court, Franklin county, Ohio, demanded $19,564.80, on an account for coal sold and delivered (Rec., pp. 1–10), and the C. H. V. & T. R. R. Co. was garnished. Shipman removed the case into the United States Circuit on the ground of diverse citizenship.

2. Shipman's answer (Rec., p. 19), claiming a balance from plaintiff, is founded upon a contract between the parties, May 28, 1879, whereby the plaintiff mining company sold Shipman all the coal from the Sugar creek lower vein, or so much as he should need for his Michigan trade, for one year, at $2.20 for *lump*, by

boat to Detroit, from Toledo, Ohio; *nut*, by boat, $1.70; *nut*, on cars at Detroit, $2.10, and states that he needed more than he was furnished, and that plaintiff charged more than the contract price, and has been overpaid $4,991.64. Defendant further said that, relying on this contract he contracted to sell coal in Michigan at prices giving him a small profit, and told plaintiff of these contracts, and plaintiff agreed to furnish enough to fill them, but failed to do so, and the defendant Shipman had to buy from other parties, at greater prices than the said contract price, and was damaged $10,000, and claimed judgment in his favor for $14,991.64.

3. The Mining Company filed a reply (Rec., p. 26), admitting the contract, but denying the rest of the answer.

4. Defendant Shipman filed an amended answer (Rec., p. 28), stating that the plaintiff charged more than the contract price, and stating the account.

5. The Mining Company filed a reply to the amended answer (Rec. p. 39), and set up a later contract, of June 24, 1879, between Shipman, on the one part, and the plaintiff and the Straitsville Coal Co. and J. S. Doe & Co., three mine owners, on the other part, whereby Shipman agreed to represent the interests and sales of these mine-owners, in the Detroit trade, and to handle only their coal, in equal quantities, and turn in his present orders on their coal at $0.70 at the mines; and take care of freights; and labor to improve the market price, sharing the increase; and these parties were to sell to no one in conflict with Shipman's interests. That it was understood that this contract *superseded the previous contract, and plaintiff* furnished coal under this, and not under the former contract; and that any other coal in the account sued on was furnished on an implied contract to pay its reasonable value.

6. June 18, 1883, the United States Circuit Court clerk, on the consent of both parties, entered in the Journal of the Court, an order referring the cause for trial to Commissioner Harrison, who was to report the testimony, with his findings of fact and

law (Rec., p. 44). This order was made under the Ohio Statute (R. S. Ohio, Section 5210), which is as follows:

"All or any of the issues in the action or proceeding, whether "of fact or of law, or both, may be referred by the court, or a "judge thereof in vacation, upon the written consent of the "parties, or upon their oral consent in court, entered upon the "journal."

7. In December, 1884, the commissioner filed his *finding of facts*, and propounded to the court *five questions of law* upon said facts—one being whether the contract of June applied to all future deliveries after an advance in the market price.

8. The court filed its answers, October 12, 1885 (Rec., p. 47), and Shipman had leave to file a *second amended answer* (Rec., p. 49), and this was replied to by plaintiff (Rec., p. 51), and Shipman demurred to the 4th part of the reply (viz., non-accrual of set-off within six years).

9. Commissioner Harrision filed his report May 23, 1886 (Rec., pp. 53 to 66), 13 printed pages. Both parties filed exceptions (Rec., pp. 66–67).

10. May 10, 1889, the court filed a "ruling," reconsidering its answers of October 12, 1885 (Rec., p. 47), to the questions propounded by the commissioner (Rec., p. 68), and, on June 7, 1889, the court entered on the journal a ruling upon the exceptions of both parties, and *recommitted* the cause to the commissioner (Rec., p. 69), who filed a *supplemental report* December 13, 1889 (Rec., p. 70) (*having heard additional testimony for Shipman*). This *supplemental report* states that judgment should be entered against Shipman for $9,282.81 (Rec., p. 72, bottom).

11. December 7, 1889, the court *confirmed the report, and ordered that the findings of the commissioner stand as the findings of the court, and gave judgment* for plaintiff (Rec., p. 73), and, concurrently, Shipman presented five exceptions (same page).

12. January 22, 1890, defendant Shipman procured a *bill of exceptions* (*extending from page 76 to page 91 of the record*).

This bill contains all the reports, rulings and findings of fact and law.

13. The assignments of error are 18 in number, and are found on pages 95, 96 and 97 of the record.

14. A motion to dismiss the writ of error (for alleged delay in filing transcript) was made and denied by this court, in March, 1894.

LAW.

I.

The court will review the rulings in the progress of the trial before the referee, as if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had, thereupon, made a special finding of the facts; as the findings of the referee were ordered to stand as the findings of the court (statement above, par. 11, Rec., p. 73).

Boogher vs. Ins. Co., 103 U. S., 90.
Board vs. Sherwood, U. S. App., 8th Cir., 64 F. R., 103.

This is authorized by a reasonable construction of the act of 3d March, 1865; R. S. U. S., 649, 700 (as to waiver of a jury).

It is also authorized by the act of June 1, 1872, R. S. U. S., 914, conforming the modes of proceeding, in cases at law, to those of the State courts.

1. As to the act of 1865.

My proposition is that the written entry made by the clerk on the court's journal, by agreement of the attorneys, satisfied the requirement of the statute of 1865, that a waiver of a jury shall be in writing, filed with the clerk, to enable this court to review.

The sole object of the statute manifestly is to require written evidence of a waiver, so that it shall not rest in parol, and I

submit that when the attorneys, in open court, authorize the clerk of the court to enter on the journal a written order for a trial by a commissioner, that is equivalent to the statutory requirement of filing with the clerk a stipulation in writing waiving a jury.

This is a reasonable application of the settled canon of construction that a thing within the reason and intention of the statute is within the statute, although not within the letter.

I am aware that the farthest the court has gone yet (*Boogher vs. Ins. Co.*, 103 U. S.) is to say that written consent to a reference is equivalent to the writing required by the act of 1865, and that such written consent to a reference may even be *presumed* from the *fact* of a reference, where the State statute provides for a reference *only* on a written consent. Here the Ohio statute provides for a reference on *either* a written consent or oral consent in open court *entered on the journal.* My argument is that the entry of an order by the clerk, upon the oral direction of the attorneys, is just the same in reason and in view of the object of the statute of 1865, as if the attorneys signed and filed a stipulation with the clerk, waiving. The attorneys do, *in effect*, appoint the clerk *their agent, to write the stipulation on the* journal. The following authorities, I submit, justify going this length.

In *Bacon's Abridgment*, Statutes I, 5, it is said: "By an "equitable construction, a case not within the letter of the statute "is sometimes holden to be within the meaning; because it is "within the mischief for which a remedy is provided. The "reason for such construction is, that the law-makers could not "set down every case in express terms. In order to form a right "judgment whether a case be within the equity of a statute, it is "a good way to suppose the law-maker present, and that you "have asked him this question, 'did you intend to comprehend "this case?' Then, you must give yourself such answer, as you "imagine he, being an upright and reasonable man, would have "given."

In *U. S. vs. Babbit*, 1 Black, 55–61, it is said: "What is

"implied in a statute is as much a part of it as what is expressed; "and, a thing within the intention of the makers of a statute is "as much within the statute as if it were within the letter."

In *Indianapolis Co. vs. Horst*, 93 U. S., 291, 300, it is said: "The intention of the law-maker constitutes the law; a thing "may be within the letter of the statute and not within its mean- "ing, and within its meaning though not within its terms."

In *County of Wilson vs. Bank*, 103 U. S., 770, 778, it is said: "What is implied in a statute is as much a part of it as what "expressed."

In *Riggs vs. Palmer*, 115 N. Y., 506, 509, this canon was applied by the Court of Appeals, where a devisee who had murdered the testator was not allowed to take as devisee, although the letter of the statute would clearly allow it.

I will now examine some of the decisions where the case was tried by a referee, and this court has inferred from the record that there was a stipulation such as is required by the Act of 1865.

In *Kearney vs. Case*, 12 Wall., 275, it was said that any statement in the finding, or record of the judgment entry, or bill of exceptions, might show that the condition in which the review is allowed, existed.

In *Boogher vs. Ins. Co.*, 103 U. S., 90, 97, it was said that, "where there was a reference, under the Practice Act of Mis- "souri, which provided for a reference only on the written con- "sent of the parties, *this court would assume that there was a* "*written consent, and would consider this as equivalent to a* "*written stipulation filed with the clerk to waive a jury, and* "*would therefore review the case on the exceptions.*"

In *Bond vs. Dustin*, 112 U. S., 604, 607, the ruling in the case last above is cited, and apparently approved.

In *Dundee Mortgage Co. vs. Hughes*, 124 U. S., 157, 160, it is said, that it could not be presumed that there was a consent in writing to the reference, for the reason that both parties conceded

the contrary; and so the case was distinguished from the *Boogher* case, 103 U. S.

I submit, therefore, that both on principle and authority, the case shown by the record, is within the review allowed by the act of 1865.

2. Let me now briefly consider the act of 1872.

This declares that trials at law in the United States courts, shall proceed as in the State courts.

Now, we all know that juries are dispensed with and referees made use of, very extensively in the State courts; and were in 1872.

And, we all know that in the courts of the United States, accordingly, much of the most important business is transacted in the same way, on a reference.

Did not Congress intend that such proceedings should be reviewed in this court as similar proceedings would be reviewed, in error, in the State court?

Is this not a fair and reasonable implication, within the rule of statutory construction, and the cases, cited above?

This court suggested this question "and *postponed its determination*," in *Boogher vs. Ins. Co.*, 103 U. S., 90, 96, *middle.*

I submit, that an affirmative answer should now be given; and this would lead to a review of the present case (aside from the act of 1865), on all the assignments of error; which I ask.

II.

Merits.

The construction of the contract by the court below was erroneous, and I will now take up the assignments of error, found Rec., p. 95.

First Error—This was in holding the contract several. Plainly the contract of June 24, 1879 (Rec., p. 40), is between Shipman of the one part, and the Coal Company, the Mining Company and Doe & Co., mine owners, on the other part, *jointly*. Shipman agreed with these mine owners jointly to sell only their product.

Second Error—This was in the conclusion that Shipman was not entitled to his proportion of the advance on any *lump* and *nut* coal which was not required to fill his prior contracts. No such limitation is found in the contract, and such a prejudicial limitation cannot be imported into it (see p. 11 of this brief).

Third Error—This was in the conclusion that plaintiff was entitled to charge the higher market price, varying from time to time, instead of the lower agreed contract price.

Fourth Error—This was in the reconsideration by the court of the fourth question propounded by the referee May 10, 1889 (Bill of Excep., Rec., p. 85), and its answer then given to the fourth question of the referee. The original answer of the court to this question, October 12, 1885 (Bill of Excep., Rec., p. 86), was made by two judges, Judge Sage and Judge Hammond, and was right. The reconsideration of May 16, 1889, nearly four years later, appears to have been by Judge Sage alone, and was erroneous. (Fourth question is on page 47 of record; first answer of court, by two judges, is on page 48, middle; second answer of court, by one judge, is on page 68, near the bottom.) The June, 1879, contract (Rec., p. 40) manifestly binds the three mining

companies to furnish Shipman coal to fill his contracts *at the prices existing when he made those contracts*, and not at changing prices, existing at the time of deliveries. Were this not so, the contract was a vain and useless thing, and of no advantage whatever to Shipman.

Fifth Error—This is the same as the fourth.

Sixth Error—This is in the conclusion that Shipman was entitled, under the contract of June, 1879 (Rec., p. 40), to his fair proportion of the increased market-price of lump coal *only*, and not of *nut* coal, *also*. No such restriction is found in the contract, and there is no testimony showing that such a restriction was intended. The only object Shipman could have in binding himself to take the whole output of the three mines, at a fixed figure, was profit, by an expected or possible advance. And the three mine-owners received by the contract, on the other hand, the advantage of having a responsible purchaser for all they could produce.

Seventh Error—This was in the conclusion that the "*fair proportion*" of the advance in price of lump coal was limited to that one-third of the lump coal which was required to fill certain time contracts of Shipman's (*13 in number*). This conclusion is found on p. 89, Rec., in the referee's *second* report (embraced in the Bill of Exceptions), which conclusion was adopted by the court as its own (Rec., p. 73), (as well as all other conclusions of the referee). Nothing appears in the record supporting such a limitation. Shipman evidently intended just the contrary (p. 12, below).

Eighth Error—This was in the conclusion (p. 89), that Shipman must be charged the *market price*, at the mines, for all the coal furnished him *after* that which was furnished him to complete his contracts with the Fulton Works and Car Spring Works. When we consider that the price always fluctuates; that the contract was made in June, 1879; and that, after October, 1879, lump advanced from $0.70 to $1.35, and *nut* from $0.25 to $0.80 (Rec., p. 82), it is *plain* that it never could have been the intention of the parties that Shipman should stand the advance besides

binding himself to take *all* the output, at a certain figure *below* which the market price *might* go! He contracted to take all the products at a given figure, and the mine owners had the guaranty of a certain sale. Of course, Shipman expected to profit by a possible advance *and took his risk* (see p. **12**, below, *B*).

Ninth and Tenth Errors—These were in the conclusion (p. 89), that plaintiff was entitled to judgment for $9,282.81; whereas by proper construction of the contract, judgment should have been in favor of Shipman, for an amount to be calculated.

Eleventh Error—This is the same, in substance, as the sixth.

Twelfth Error—This is the same, in substance, as the seventh.

Thirteenth Error—This is the same, in substance, as the eighth.

Fourteenth Error—This is the same, in substance, as the ninth.

Fifteenth Error—This is the same, in substance, as the tenth.

Assignments 16, 17 and 18 are formal.

III.

A general view of the contract of June, 1879, between Shipman, as a coal dealer at Detroit, and the three mine owners in Ohio, will show the court that the judgment should be reversed and a new trial granted.

(*A*) 1. At the time of the making of the contract of June 24, 1879 (Rec., p. 40), all the parties to the contract were very familiar with the condition of the Detroit soft coal market; they had all been doing business in that market, and had known the custom of making sales for future delivery at a fixed price. It was in the contemplation of the plaintiffs that the defendant should continue supplying such trade in the same manner; and that, not only for his then present trade and orders, but for such further and additional trade as he could secure, he should, when necessary, make sales under the same custom of a fixed price for future deliveries as needed (Bill Exc., Rec., p. 77).

2. The referee finds this custom to have been well established, and well known to the plaintiffs. *The contract binds the defendant to confine himself* to the *use and handling of their coals only.*

3. With this fact established, the court below was clearly in error in holding (Bill Exc., Rec., p. 87) that "*the three companies were not bound to furnish to the defendant coal to fill contracts made by him for future delivery at the market price at Detroit, at the time the defendant made such contracts.*" This seems to the business mind proof that the referee and court had not considered the contract in all its bearings, or fully appreciated the intention of the parties in making the contract.

4. That it was the intention that Shipman should make such contracts for future delivery, is also shown by the clause, that he is to labor to improve the market and give plaintiffs their "fair proportion" of any increased price he may be able to obtain (Rec., p. 40). He is further required to keep his books, papers, sales and *contracts* (the June 24 contract *in terms* recognizes *contracts* for future delivery), subject to plaintiffs' inspection (Rec., p. 41, top).

5. What is the meaning of the clause, "and they (the plaintiffs) will aid and encourage the trade of said Shipman in all lawful ways in their power, etc.," if not that they would protect the defendant in getting the trade?

It cannot be seriously claimed, that under this contract Shipman was to run all the risks of an advance of the market price on his time contracts, and give the plaintiffs *all* the advance; when the June contract says: "Defendant shall ask no greater part of such increase than shall be his fair proportion thereof" (Rec., p. 41).

To a business man, it would be clear that the intention of all the parties by this contract was:

(*a*) To let the plaintiffs out of the Detroit market. (Formerly dealers there.)

(*b*) To still find a market for their coal at Detroit.

(*c*) To put defendant in a position to increase his sales; to make contracts for future delivery, as needed by consumers, at fixed prices; and at the same time protect against an increased buying price on the coal required for such time contracts.

(*d*) To enable defendant Shipman, in the general trade, and also on such time contracts, to get better prices, partly by removing some of the competition and partly by increasing his trade.

(*e*) To keep the plaintiffs advised of the trade at Detroit by inspection of defendant's books, sales, and *contracts.*

(*f*) And finally to give the plaintiffs the benefit of all of Shipman's trade.

(*B*) There is but one other question arising from the contract that seems to have been misunderstood by the court below, and that is as to defendant's "*fair proportion*" of the advance in the market price.

The court seems to have gone upon the idea that defendant was only entitled to the half of increased market price *on coal furnished for time contracts*, while his purchases from plaintiff were not only for time contracts but also *for his general trade.* This would make the allowance of one-half the advance of market price apply to *all* the shipments to the defendant instead of *one-third* of them, as found by the referee and included in the judgment. Plainly, the one-half allowance does apply to *all* the shipments.

I submit that it is evident that the judgment ought to be reversed and a new trial ordered.

ALFRED RUSSELL.

Supreme Court of

October Term,

[redacted] W. [redacted]

THE [redacted]
PANY, [redacted]

[redacted]

BRIEF
FOR PLAINTIFF IN ERROR.

[redacted]
Of Counsel for Plaintiff in Error.

[redacted]

No. 306.

Supreme Court of the United States

OCTOBER TERM, 1894—(APRIL, 1895.)

OZIAS W. SHIPMAN, *Plaintiff in Error*,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY, *Defendant in Error and Plaintiff below.*

ERROR TO THE U. S. C. C. FOR THE S. D. OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

For a statement of the case see the statement in the brief of Judge ALFRED RUSSELL for plaintiff in error filed herein. Also the statement in the brief of Mr. J. H. Gordon, for defendant in error.

I only desire to supplement these statements by setting out here some of the findings of fact by the referee, including the contract of June 24, 1879, not for the purpose of asking any review of any finding of fact, but to bring together the contract and the facts surrounding it and in the light of which, the contract must be considered in order to give a proper construction to it; also the questions of law, arising upon the findings of fact, propounded by the referee to the Court, and the answers of the Court thereto.

The findings of fact found by the referee are the following:

"On and for some years prior to June 24, 1879, the respective plaintiffs in these actions were the separate and several owners and operators of coal mines in the Hocking Valley of Ohio. (Record, p. 44.)

"For some years prior and up to June 24, 1879, the defendant Shipman had been extensively engaged in the business of buying and selling coal in the Detroit market, and had, from time to time, purchased considerable coal for that market from said Straitsville Central Mining Company. (Rec., p. 44.)

"Said Martin & Doe and J. S. Doe & Co., had also prior to June 24, 1879, established a coal office in Detroit and competed with Shipman for the Detroit trade. (Rec., p. 44.)

CONTRACT.

"O. W. Shipman, Straitsville Coal Co., Straitsville Central Mining Co., and J. S. Doe & Co., agree with each other as follows:

"Shipman agrees to represent the entire interests and sales of the coal of the other three parties aforesaid in the trade that may be denominated the Detroit trade by rail or by vessel to Detroit or to and through Detroit, Mich.; that he will confine himself to the use and handling of their coal alone in all sales of soft coal for whatever use or purposes or market, taking the same from them in equal quantities; that he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines, and that he will take care of all freights and pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties, and

that he will labor to improve the market price of said coal giving to said parties the advantage of whatever improvement may be made in the market for said coal, asking no greater part of such increase himself than shall be his fair proportion thereof, and that he will keep his books, sales and contracts of coal all open to their inspection at all times. Said other above-named parties agree to sell coal to no one to conflict with the interests of said Shipman under this agreement, and that they will aid and encourage the trade of said Shipman in all lawful ways in their power so long as he shall confine his sales and operations in soft coal to the product of their mines.

Given under our hands this 24th day of June, A. D., 1879. (Signed by the parties.)

(See pages 40 and 45 of the Record.)

"At the date of this written contract, and for some time before and since then, there existed at Detroit an usage or custom among coal dealers and their larger customers to make contracts for the sale and delivery of coal at a stipulated price for the year next ensuing, and this usage or custom was known to all the parties to these actions when they entered into said contract of June 24, 1879." (Rec. p. 45.)

"At the date of said contract of June 24, 1879, the market price of lump coal was seventy cents and of nut coal twenty-five cents per ton at the mines in the Hocking Valley. (Rec., p. 45.)

"After the execution of said contract of June 24, 1879, the plaintiffs respectively shipped coal to Shipman at Detroit and to his customers on his orders, and separate accounts were kept both by Shipman and the plaintiffs, respectively, of the coal shipped by each of the plaintiffs. (Rec., p. 45.)

"For the coal so shipped by the plaintiffs, respectively, monthly bills were rendered by them respectively, to Shipmau, in which bills they charged for all coal shipped prior to October 1, 1879, at the rate of seventy cents for lump and twenty-five cents for nut coal per ton at the mines, and for all coal, both lump and nut shipped after October, 1879, bills were rendered to Shipman at the market price, which was largely in excess of seventy cents for lump and twenty-five cents for nut coal at the mines. (Rec. p. 45.)

"The price of coal went up above seventy cents for lump and twenty-five cents for nut, per ton, at the mines along in July and August, 1879, but the rise was small and the exact advance does not appear from the evidence. (Rec., p. 45.)

"In the account rendered in August, 1879, by the Straitsville Central Mining Company one item is as follows:

"'1323 tons lump, E. I. Co., 75 cts., $992.25'" and the defendant in his letter, "Exhibit 5," called the attention of the Company to the fact, and the Company in its September account credited the defendant "By five cts. per ton overcharge on 1,323 tons, E. I. Co., Aug., $66.15.' (Rec., p. 45.)

"The capacity of the Straitsville Central Mining Co. of mining coal largely exceeded that of either of the other companies to the alleged contract of June 24, 1879, or of both the other companies combined. (Rec., p. 45.)

"On the day the alleged contract of June 24, 1879, was made and at the time Martin & Doe sold out thier business at Detroit to the defendant, J. S. Doe & Co., and Martin & Doe entered into a contract with the defendant to withdraw from the Detroit market. (Rec., pp. 45, 46.)

"In the orders given by Shipman to the Straitsville Central Mining Co. for coal, he did not state at what price the coal was to be furnished to him. (Rec., p. 46.)

"There were some contracts and orders for coal binding on Shipman June 24, 1879, but the evidence does not show how many and what they were, excepting that October 18, 1879, he had a written contract with Eureka Iron Co., based on seventy cents., one with Detroit Bridge & Iron Co. for six hundred tons at same figures, and one with Detroit Car Spring Co. for two cars per week, same figures, and with three other parties for about ten cars per week at the same price; these were all. (Rec., p. 46.)

"The letters and exhibits in evidence show that separate orders were given by Shipman on plaintiff for coal, and separate bills were rendered by plaintiff for coal shipped on such orders." (Rec., p. 46.)

"Questions of law arising upon the foregoing facts." (Propounded by the referee to the Court.)

(The first question is omitted because no error is assigned to the answer of the Court thereto.)

The answer of the Court to each question is for convenience inserted after each question.

"2. Is the written contract of June 24, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties? (Rec., p. 46.)

(Ans. by Court.) "*A.* Testing the question by the nature of the interests of the parties who contracted with Shipman, the contract should be held to be several, and it is so construed by the Court." (Rec., p. 47.)

Q. "3. What is the meaning of the clause in the contract of June 24, 1879, in these words: 'That he will turn in all his present trade and order on their coal at the price of seventy cents per ton at the mines.' (Rec., p. 46.) (1.) Does it mean that the three companies should furnish coal at

seventy cents per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

"Or (2) does it mean that they should furnish coal at seventy cents per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

"Or (3) does it mean that they should furnish coal at seventy cents at the mines to fill all contracts which Shipman had and might thereafter make, before the market price of coal advanced, with parties who had previously been customers of his? (Rec., p. 46.)

"Or (4) does it mean that they should furnish coal at the mines to fill all contracts which Shipman then had, and might thereafter make, before the market price of coal advanced, with any party, whether previously a customer of his or not?" (Rec., p. 47.)

(Ans. by Court.) "*A.* The clause quoted includes all contracts and orders which Shipman then had, whether for the immediate or for the future delivery of coal. It does not bind the three companies to fill contracts made by Shipman subsequently to June 24, 1879, at seventy cents per ton at the mines." (Rec., p. 48.)

Q. "4. Viewing all the provisions of the contract, as well the above quoted provisions as the others, were the three companies required to furnish Shipman coal to fill contracts made by him for future delivery, at the market price of coal in Detroit at the time Shipman made such contracts, and not at the market price at the time such coal was actually delivered, by the plaintiffs, to Shipman from time to time during the existence of such contracts?" (Rec., p. 47.)

(Ans. by the Court. "*A.* The three companies were

bound to furnish Shipman coal to fill contracts made by him, for future delivery, at the market price of coal at Detroit, at the time Shipman made such contracts, and not at the market price at the time of the delivery of such coal by the companies to Shipman, from time to time, during the existence of such contracts." (Rec., p. 48.)

To the fifth question propounded by the referee to the Court and to the answer of the Court thereto, no assignment of error has been made.

These answers were given by Judge SAGE and Judge HAMMOND, and as a matter of fact, the late Hon. Stanley Matthews, then a member of this court, sat with them. In accordance with these answers of the Court, the referee made his report and found the sum of $230.74 due the plaintiff—defendant in error here—from the plaintiff in error here.

On exceptions by both parties to the report of the referee, the Court affirmed all of its said answers except the answer to the fourth question. And, as to that, held, "that the answer to the fourth question was wrong, and that the true answer is that, excepting contracts within the designation 'present trade and orders,' which the contract of June 24, 1879, requires him to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract were not bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but that they were entitled to the market price at the date of the actual sale of said coal by them to Shipman, less his 'fair proportion' of any advance in the price, as specified in the contract of June 24, 1879." (Record, p. 68.)

In accordance with this ruling, the referee reported as the amount due the plaintiff—defendant in error here—from the plaintiff in error here, the sum of $9,282.81, instead of the sum of $230.74, as in his first report.

I.

LAW.

Whether the form of reference to the referee in this case is equivalent to, or the Court can presume from it that, a waiver of a jury was made in writing, it seems to me is immaterial. The questions we seek to have reviewed by this Court are solely questions of law arising upon the facts found by the referee. No exceptions were taken or objection made to the referee's finding of facts. Our claim is, that those facts do not support the judgment.

This Court has repeatedly held that when a case has been referred to a referee without any stipulation in writing waiving a jury, on review, it will consider whether there was any error of law in the judgment rendered by the Circuit Court upon the facts found by the referee. See—

Roberts vs. *Benjamin*, 124 U. S., 64.
Andes vs. *Slauson*, 130 U. S., 435.
Bond vs. *Dustin*, 112 U. S., 604.
Paine vs. *Central Vt. R. R. Co.*, 118 U. S., 152.
Booher vs. *Ins. Co.*, 103 U. S., 90.
Dickinson vs. *Planters' Bank*, 83 U. S. 250.
Stanley vs. *Board of Supervisors*, 121 U. S., 535.

II.

MERITS.

The assignments of error are found (Rec. p. 95). These assignments of error are based, ultimately, upon the construction of the contract of June 24, 1879, and must stand or fall, according to the construction given to that contract. The construction given by the Court to the contract, by its answer to the second and third questions propounded by the referee were wrong, and the *final* answer of the Court to the fourth question propounded by the referee was wrong, and the *first* answer was right.

First Error—This is to the answer of the Court to the second question propounded to it by the referee. This answer was, that the contract was several.

We say that it is joint on the part of the three parties —miners—of the one part, and Shipman, the defendant, of the other part, as to all the coal Shipman should sell, use and handle, in the trade that may be "denominated the Detroit trade."

The real meaning of the contract, that Shipman "agrees to represent the entire interest and sales of the coal of the other three parties, * * "and confine himself to the use and handling of their coal alone," * * and that the other three parties, "agree to sell coal to no one to conflict with the interests of said Shipman *under this agreement*, and that they will aid and encourage the trade of said Shipman in all lawful ways in their power," is simply this—that defendant agreed to sell all the coal of the plaintiffs he could, and the plaintiffs agreed that they would furnish him the coal to supply his purchasers of coal. They said to

Shipman, you sell all our coal you can and we will protect you. We will furnish you coal to fill contracts you make for sale of coal at the market price of coal, at the time you make your contracts for coal.

The contract means, that Shipman is to represent the entire interests and sales of the coal of the other three parties, and confine himself to the use and handling of their coal alone, and that the other three parties will sell to no one else, and aid and encourage him, etc., is that Shipman agrees to buy of the other three parties all the coal he can sell, use and handle in the trade that may be denominated the Detroit trade, and the other three parties jointly agree to sell him all the coal that he can sell, use and handle in that particular trade.

Mr. Shipman was not the agent of the other three parties, in the sense of principal and agent. But in selling their coal as principal for himself. He was to *advertise* their coal, represent them and their interest by representing, in making sales, that he was handling Hocking Valley coal from the mines of these miners, not only representing their interest, that is working up a market for their coal, to the extent of the coal he bought of them and sold to others, but thereby establish a reputation for their coal.

The referee finds that the capacity of the mine of defendant in error was greater than that of both the other mines combined.

Shipman's undertaking was great, and he could not and did not rely on three times the capacity of the smallest mine, and it was not intended that he should. No such limit was thought of, much less contracted for. The defendant in error on June 24, 1879, had a then existing contract with the plaintiff in error for the entire output of its mine. It

certainly did not barter away that right, surrender it, for the capacity of the smallest mine.

"The rule, that covenants are to be treated as joint or several according to the interests of the parties in the subject matter of the controversy, relates only to the parties suing, and not to the parties sued." Chitty on Contracts, 11 Am. Ed. p. 1355.

"If however, there be two different covenants in the same contract, one of them may be joint and the other several." Chitty on Cont. 1341 and note M page 1354.

"Whenever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of joinder are not necessary for this purpose; but on the other hand, there should be words of severance in order to produce a several responsibility or several right." Parsons on Contracts, 7th Ed. vol. 1, p. 11; also note (*a*).

Shipman did not contract with each of the three companies for one-third of his supply. He contracted with the three jointly for his entire supply, and they bound themselves jointly to deliver it. They jointly bound him to make all his sales from their mines, and they jointly agreed to sell to no other person to conflict with his interests, and to aid and encourage him in all lawful ways. His agreement to sell their coal implies an obligation on their part to furnish when, and as sold by him. They were sureties for each other. In the work cited by the Court, Chitty on Cont., page 1353, the author says: "Any number of persons may bind themselves jointly for the performance of one entire duty, and so become sureties for one another for the thing contracted to be done." See also 1 Addison on Contracts, p. 79. That is precisely what was done in this case. In order to induce Ship-

man to take all the coal to fill his contracts from them, they jointly undertook to supply his trade.

The three companies could not send coal to fill Shipman's time orders only when and as coal was to be delivered by him, as required by the orders. The contract required him to pay freight, and he could not be held to hold coal over for future delivery.

"A contract made by two persons to pay a certain *sum* of money to a third person, equally out of their own private cash, is a joint contract, and they must be jointly sued upon it."

Byers v. *Dobey*, 1 H. Blst. 236.

A. and B. made an agreement with C. "to let him have a share of the profits, if any, in making a turnpike road, in proportion to the help he afforded in completing the same; the one-half of it to be taken from A.'s part, and the other from B.'s part." The court said, "The objection is that the defendants were not liable to be sued jointly, as, by the agreement, one-half of the plaintiff's compensation was to be taken from A.'s part, and the other from B.'s part. But it was still a joint undertaking on the part of the defendants, and this latter mode of the memorandum was only a designated mode of distribution of the debt as *between* the defendants."

Muzzy v. *Whitney*, 10 Johns. 226;
Lawrence v. *Kidder*, 10 Bart. 641.

So in this June 24th contract, the obligation by the three parties to furnish Shipman coal to fill contracts he made in "representing their entire interests" was joint, and the taking from each in equal quantities and the payments to each, etc., are only designated modes of distributing the obligation to furnish coal among themselves—the "three other parties"—and of the manner of payments.

"Contracts are joint, not several, unless expressed to be several."

Brady v. *Reynolds*, 13 Cal. 31.

"In a contract between A. of one part and B., C. & D. of the other part, binding A. to build a vessel for a specified sum, and the other parties to pay certain sums at specified times in proportion to the shares in the vessel set against their respective names, the liability of the parties of the second part is joint and not several."

Ripley v. *Crooker*, 47 Me. 370.

"A payment made by the part owners severally, with several receipts from the builder, not under seal, will not convert the indebtedness for the unpaid balance from joint to a several one."

Ripley v. *Crooker*, 47 Me. 370.

The obligation to furnish coal by the three mines, to Shipman, to fill contracts for sale of coal made by him, "in representing their interests and sales of their coal," was joint, and such joint obligation is unaffected, even though there be covenants elsewhere in the contract which are several.

The words, "taking the same from them in equal quantities," do not make the obligation expressed and implied in the contract, to furnish coal, several. These words are solely for the benefit of the "other three parties."

The agreement commences by stating that the parties "agree with each other."

Where, in this contract, is there any agreement between the "other three parties"—the mining companies—among and between themselves alone, if it is not intended to be in the words, "taking the same from them in equal quantities?" Certainly, nowhere. The only agreement of each with the

other, than Mr. Shipman, is in substance and effect, that if Shipman does not, or cannot sell, use and handle *all* the coal of each party, then among themselves, they will apportion it.

SECOND ERROR—This is in the conclusion that Shipman was not entitled to his proportion of the advance on any lump and nut coal which was not required to fill his prior contracts.

The contract does not say so. It in express terms says he is to have his "fair proportion" of *any* increase price. (Rec., p. 41.)

I insist that if any portion of the coal sued for should be held not to go in under the June contract, but to be charged for at the market price at the time shipped—the price charged in account of plaintiff—then that we should have our fair proportion, to-wit: one-half of the increase above the market price at the time the June contract was made, less the increased cost of mining.

I think the referee erred in his finding upon this point. I do not see why the rule applicable to partners does not apply, that when no definite proportion of a division of profits is designated, an equal division is the rule.

This contract was the expression of a mutual and joint enterprise, for the mutual and joint benefit of each and all the parties to it.

A construction of the contract that gives all the advantage to one party to it over the other is unfair and unjust.

A technical construction ought not, and perhaps cannot, be given the June contract. The contract evidently was not written by either a technical lawyer or an exact and clear-headed layman. It should be liberally construed so as to effectuate the intent of the parties to it.

The evident intent was that Shipman should have some proportion of any advance that might, from any cause, be obtained. They stipulated that he should have his "fair proportion." As no exact proportion was mentioned, I insist that Shipman should have half of the advance less any increase cost there might have been, if any, of mining. This certainly would be more just and fair between the parties than that constructon which deprives him of any share of the advance.

Mr. Gordon, in his brief (page 13), says that Mr. Shipman "paid the advance price without a murmur or protest." This is not correct. There is no such finding by the referee. The referee makes a letter of Mr. Shipman of November 14, 1879, a part of his findings, and that letter makes a very strong protest and says he expects to hold them to account.

THIRD ERROR—This is that the finding of the referee: "That to the extent of one-third of the coal so required by Shipman to fill said contracts the plaintiff must be limited in price to seventy cents for lump coal and twenty-five cents for nut coal at the mines, and for the excess so furnished by plaintiff to said Shipman after October 1, 1879, over and above the one-third of the quantities required by him to fill said contracts, the plaintiff is entitled to charge and receive the current market price from time to time when said coal was delivered, to-wit: the prices charged in plaintiff's account."

Whether this finding is right or wrong depends upon the construction that is given to the contract. What that construction should be I have already discussed under FIRST and SECOND ERRORS, and will not repeat here; and will also discuss it further under FOURTH ERROR.

FOURTH ERROR. This relates to the construction given by the Court to the contract by its final or last answer to the

fourth question propounded to it by the referee (Record, pp. 85, 86). This construction was clearly wrong. The first answer of the Court to this fourth question (Record, p. 48) was right.

The reason given by the Court (Record, p. 86) for the change of this answer and the then constructions is not sound. The Court in the first instance did not in its answer to the fourth question, treat the contract as a contract of agency in the nature of a *del credere* commission. Its answer to the fourth question was clear and complete without reference to agency of any kind, and after it had distinctly and clearly answered each and all the questions, by way of addenda, said the contract was a contract of agency in the nature of a *del credere* commission.

The first answer to the fourth question (Record, p. 48) does not need any rule, of principal and agent to support it.

This fourth question was—"Viewing *all* the provisions of the June 24 contract," what is its construction?

Viewing *all* the provisions of the June contract; considering its object and intent as derived from the surrounding circumstances, such as the condition of the coal trade at Detroit; the anxiety of all parties to better that trade; the contract of two of the parties to the June contract with Shipman, of the same date, and referring to the June contract, by which they withdrew from the Detroit trade, and turned over their interests there to Shipman; and bearing in mind that all the parties to the June contract well knew that it was the custom for dealers in the Detroit coal trade to make contracts running for a year, and that the coal to fill which would have to be delivered from time to time during and extending over the entire year; it would seem that the first answer (Record, p. 48) of the Court was correct, and the last answer (Record, p. 86) was wrong.

In construing this contract, the Court should consider:

1. The situation of the parties and the surrounding circumstances.

"A court, when called upon to construe a writing, may look, not only to the language employed, but to the subject matter and surrounding circumstances."

Mobile & Montgomery Ry. Co. vs. *Jurey*, 111 U. S., 584.
Spaulding vs. *Coon*, 50 Mich., 622; 18 N. Y., 502.
Blossin vs. *Griffin*, 3 Keys, 436.
Field vs. *Woodmancy*, 10 Cush., 431.
Mill Dam Foundry vs. *Hovey*, 21 Pick., 417-441.
2 Parsons on Cont. (7th ed.), bottom p. 631.

"In the construction of written instruments, the intention of the parties must govern, and to ascertain that intention, regard must be had to the nature of the instrument itself, the condition of the parties executing it, and the objects which they had in view."

Strong vs. *Gregory*, 19 Ala., 146.
Montgomery vs. *Firemen's Ins. Co.* 16 B. Mon. Ky. 427
Murray vs. *Caruthers*, 1 Metc., Ky., 71.
Pratt vs. *Cotton Co.*, 51 Miss., 470.

2. The custom and usages of the trade as known and understood by the parties to the contract.

Parsons on Cont. (7th ed.), bottom page 666.
Rindskoff vs. *Barrett*, 14 Iowa, 101; see *Robinson* vs. *Fiske*, 25 Me., 401.
Wadsworth vs. *Alcot*, 6 N. Y., 72.
Walls vs. *Bailey*, 49 N. Y., 464.
Johnson vs. *DePeyster*, 50 N. Y., 666.
M. D. Foundry vs. *Hovey*, 21 Pick., 441-2.
Livingston vs. *Tyler*, 14 Conn., 493.
Devering vs. *B. M. Coal Co.*, 54 Penn., 291.
2 Parsons on Cont., 541.

The surrounding circumstances, the object and intent of the parties, and the custom which we invoke, have been found and reported by the Referee.

And we claim that the finding and evidence clearly and unequivocally shows that when the June contract was made, all the parties well knew that, in the Detroit coal trade, the custom was for dealers to make contracts at a fixed price to supply coal for a year, and that such coal would, in all cases, be required to be delivered in car loads, from time to time, extending over and during the entire year. The defendant in error knew, or must be held to have known, what kind of contracts Shipman made. For the contract provided that "he (Shipman)" will keep his books, sales and *contracts of coal all open to their inspection at all times.*"

It was also expected, and not only was it expected, but the contract, in spirit and in terms, required that Shipman should, *at once*, exert himself to the utmost to sell coal, to get contracts, and they would be yearly contracts, to be filled by installments from time to time. He was, in all good faith, under obligation to increase his trade, to sell all the coal he could for the parties. He was not to wait until coal advanced in price before he did anything in "representing the entire interests and *sales of the coal of the other three parties.*"

If Shipman made sales of coal, and contracts for delivery of coal, which coal was at the then price of 70 cents per ton for lump, and 25 cents for nut coal, he did it in "representing the interests and sales of the coal" of the plaintiffs. He did so, because required to do so by the contract, and the plaintiffs were bound to supply him the coal to fill such contracts. They had contracted to do so. They had contracted to furnish him the coal from their mines which he would sell to purchasers.

That construction of this contract is unfair and unjust which requires Shipman to fulfill his part of this contract, and sustain all the loss on these contracts and allow the defendant in error (and the other parties) to reap all the gain. And that is just what the construction of the Court below does. The contract means no such thing.

These three companies entered into this contract with Shipman. By it they bound him to represent their entire interests; to build up as large a coal trade as possible, for which they were to furnish him the coal to supply it. He was to make contracts at a price based upon the price of coal at the time of making such contracts, in representing their interest and sales of their coal; and which contracts in contemplation of the parties were to run for a year and to be filled as needed and this the defendant in error knew or should be held to have known. For the contract provides that he should keep his *contracts of coal all open to their inspection at all times.*

Now it seems to me preposterous to say that if coal advanced in price during the year, that the three companies were entitled to the increase on all coal they furnished, after such increase, to fill such contracts, so made by Shipman in representing their interest, for *their* benefit as well as his, with their full knowledge, consent and request, and made by agreement with them. For they had contracted with him to make such contracts, or else the June contract is a vain, meaningless thing. Yet Shipman would be bound, under his contracts with outside parties, to fill such contracts at the price agreed upon between them, at the time of the making such contracts, and also be obliged under the June contract, to take his coal to fill such contracts from the three companies—plaintiffs.

The three companies contracted with Shipman that he should turn in his present trade and orders, and *make other contracts*, and enlarge his market and trade, or else they made no contract. And they contracted to furnish him the coal to fill them; for that is what they meant by encouraging his trade, and covenanting to sell coal to no one else. And it seems to me that in all justice and conscience, that that construction should be given to this contract, so that the defendant in error should be compelled to carry out its contract, and be required to furnish the coal to fill such contracts at the market price of coal at the time when such contracts were made.

FIFTH ERROR.—This is the same as the fourth.

SIXTH ERROR.—This relates to the finding that Shipman was entitled to his fair proportion of the increased market price of lump coal only, and not of nut coal also. This is because of a *very narrow* construction of the contract. It is because the contract does not mention nut coal especially. It speaks of "soft coal," and nut coal is included in "soft coal," and the price of nut coal was just as definitely found by the reference as that of lump coal.

SEVENTH, EIGHTH, NINTH AND TENTH ERRORS, are the results of a wrong construction of the June 24, 1879 contract, which I have already pretty fully discussed.

Respectfully submitted,

E. L. DEWITT,
Of Counsel for Plaintiff in Error.

Alfred Russell
F. D. & H. Kenney.

APR 15 1895
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 306.

OZIAS W. SHIPMAN,

Plaintiff in Error,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY.

BRIEF.

J. HOLDSWORTH GORDON,
Counsel for The Straitsville Central Mining Co.

Law Reporter Print

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 306.

OZIAS W. SHIPMAN,

Plaintiff in Error,

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY.

Statement of Case.

This cause is an action instituted by The Straitsville Central Mining Company, a corporation organized under the laws of the State of Ohio, against Ozias W. Shipman, to recover, originally, the sum of $19,564.89 claimed to be due on account of goods sold and furnished by the plaintiff to the defendant, as per bill of particulars filed in the cause, with interest on said sum from June 18, 1880.

The cause was commenced in the Court of Common Pleas for Franklin County, Ohio, on the twenty-first day of June, A. D. 1880. With said suit was filed a petition for attachment, and affidavit supporting the same, made by the secretary of the company. Attachment was ordered, and writ issued on the same day, against the Columbus and Hocking Valley Railroad Company, a corporation of the State of Ohio, and The Baltimore and Ohio Railroad Company, a corporation of the State of Maryland, attaching any money or credits due or to become due to the defendant Shipman, liable to such attachment.

On July 28, 1880 (Rec., p. 11), the defendant Shipman filed his petition for the removal of the cause to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division, which order was granted, on December 6, 1880, and the cause filed in said circuit court.

On November 27, 1880, the garnishee, The Baltimore and Ohio Railroad Company, answered to the garnishment, that it was not indebted to the defendant Shipman—

> "in any manner or form in any sum whatever, and has no property of said defendant in its possession or under its control."

On the 30th day of March, 1881, (Rec., p. 15) a supplemental affidavit was filed in behalf of the plaintiff showing certain payments by defendant since the filing of suit, aggregating $13,017.90, leaving still claimed the sum of $6,546.90, with interest thereon from September 6, 1880, and interest on said original principal from said 18th day of June, 1880, reduced by the interest on said several payments from the time when made to said 6th day of September, 1880, and attachment was issued against The Columbus and Toledo Railroad Company, against any property, credits, &c., of the defendant in its possession or control.

On the 7th day of April, 1881, (Rec., p. 18) the defendant filed his answer denying the claim of the plaintiff and setting up counter claims, and alleging that the plaintiff had agreed to sell and deliver, and did sell and deliver, all the coal raised and produced from its Sugar Creek lower vein coal, or so much thereof as the defendant should need and require for his coal trade in the State of Michigan for the term of one year from the 28th day of May, 1879, at certain prices set forth; that from the 28th day of May, 1879, to the 28th day of May, 1880, the defendant needed and required largely more coal than was furnished during said period; that the price of the coal, as charged,

exceeded the contract price. The defendant admits that the account rendered up to October 1, 1879, is correct, but claims that the charges after that date are incorrect, as all coal delivered after October 1, 1879, was sold and purchased under and by virtue of a contract dated May 28, 1879, between plaintiff and the defendant, and at the prices therein stated. The defendant claims that he has paid in excess of the amount due by him the sum of $4,991.64. The defendant further sets up as defense and as counter claim that acting under direction of plaintiff and pursuant to and fully relying upon the aforesaid contract, he made and entered into contracts for the sale and delivery of coal to sundry persons, firms and corporations, at Detroit, and its vicinity, in the State of Michigan, to be delivered from time to time during the continuance of said contract with the plaintiff, at prices which left but a small profit to defendant; that at the time of making such contractss for the sale of coal by defendant as aforesaid, defendant informed plaintiff thereof, and that plaintiff then agreed with defendant that plaintiff would furnish and deliver to defendant the coal necessary to fulfill such contract on his part, but that from and after said 1st day of October, 1879, the plaintiff neglected and refused to furnish such coal, although often requested so to do by this defendant, at the price agreed upon as aforesaid, and that by reason thereof the defendant was obliged to purchase and did purchase, large quantities of coal from other persons than the plaintiff and pay therefor greater prices than the prices at which the plaintiff had agreed, as aforesaid, to sell the same to defendant, to the damage of defendant of ten thousand dollars, and the defendant claims set-offs and counter claims of $4,991.65, and $10,000.00 damages, aggregating $14,991.65.

On the 6th day of June, 1881 (Rec., p. 24), The Columbus and Hocking Valley Railroad Company, garnishee, answered that at the time of garnishment there was due by it

to the defendant, the sum of $10,811.35, subject to an order in favor of Peter Hayden for $2,606.69, leaving a balance due on April 1, 1881, of $8,204.66.

The Columbus and Toledo Railroad Company answered that it held no money or credits of defendant (Rec., p. 25).

On November 29, 1881, the plaintiff filed its reply to the claim and counter claim of defendant (Rec., p. 25) denying the claims set up and giving additional credits.

On December 6, 1882, the defendant filed his amended answer to plaintiff's petition reiterating his former defenses, setting up an agreement with plaintiff of date May 28, 1879, and increasing the amount claimed for damages and counter claim to $24,027.23 (Rec., pp. 28 and 29).

On 20th December, 1882, the plaintiff filed its reply to the amended answer of the defendant (Rec., p. 39) denying the claims of the defendant and claiming that on the 24th day of June, 1879, the defendant entered into an agreement which abrogated the agreement of May 28, 1880, under which defendant claimed. That this subsequent agreement superseded by its terms and provisions, all other coal contracts between the parties; that by it the plaintiff was to furnish one-third of the coal called for and no more, at the market price of such coal for the time being at their mines, except so far as the defendant's then "present trade and orders" were concerned, which were to be filled at the price to him of seventy cents per ton at the mines, each of the parties to the agreement furnishing one-third of the coal necessary therefor, &c.

By agreement the cause was, on the 18th day of June, 1883, referred to Richard A. Harrison, a Master Commissioner of the court, who was directed to report the testimony, with his findings of fact and law separately stated, to the court, without unnecessary delay. (Rec., p. 44.)

In December, 1884, the Commissioner filed his finding of

fact and propounded certain questions of law to the court for his guidance (Rec., pp. 46 and 47) as follows:

"1. Does the written contract of June 24th, 1879, operate to annul or suspend the contract alleged by Shipman in his amended answer in the Straitsville Central Mining Co. case to have been made between him and that Co. on the 28th of May, 1879, neither Martin & Doe nor J. S. Doe & Co. being parties to the alleged May contract?

2. Is the written contract of June 24th, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?

3. What is the meaning of the clause in the contract of June 24, 1879, in these words:

'That he will turn in all his present trade and orders on their coal at the price of seventy cents per ton at the mines.'

(1) Does it mean that three companies should furnish coal at 70c per ton at the mines to fill only such orders and contracts as Shipman then had for the immediate delivery of coal?

Or (2) does it mean that they should furnish coal at 70c per ton at the mines to fill all contracts and orders which Shipman then had, whether for the immediate or future delivery of coal?

Or (3) does it mean that they should furnish coal at 70c at the mines to fill all contracts which Shipman had and might thereafter make, before the market price of coal advanced, with parties who had previously been customers of his?

Or (4) does it mean that they should furnish coal at 70c at the mines to fill all contracts which Shipman then had and might thereafter make, before the market price of coal advanced, with any party, whether previously a customer of his or not?

4. Viewing all the provisions of the contract, as well the above-quoted provisions as the others, were the three companies required to furnish Shipman

coal to fill contracts made by him for future delivery at the market price in Detroit at the time Shipman made such contracts and not at the market price at the time such coal was actually delivered by the plaintiffs to Shipman from time to time during the existence of such contracts?

5. Was the contract of June 24, 1879, terminable at the will of either party?

If the parties did not agree as to their respective rights and liabilities under the contract after the market price of coal rose greatly in October, 1879, would such disagreement terminate the contract?"

To these questions of law on October 12, 1885, answers were filed: (Rec., p. 47.)

1. That the contract of June 24, 1879, annulled the contract of May 28, 1879.

2. That the contract of June 24, 1879, was a several contract.

3. That the clause in said contract in the words—

> "that he will turn in all his present trade and orders on their coal at the price of 70 cents per ton at the mine"

should be construed to and—

> "includes all contracts and orders which Shipman then had, whether for the immediate or for the future delivery of coal. It does not bind the three companies to fill contracts made by Shipman subsequently to June 24th, 1879, at 70c per ton at the mines."

4. That—

> "the three companies were bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit, at the time Shipman made such contracts, and not at the

market price at the time of the delivery of such coal by the companies to Shipman, from time to time during the existence of such contracts."

5. "The contract of June 24th, 1879, was terminable at the will of either parties, subject to the obligations of the companies to deliver and of Shipman to receive coal for the completion of time contracts then in existence, but the failure of the parties to agree as to their respective rights and liabilities under the contract would not operate to terminate the contract."

On the 21st day of December, 1885, the defendant was granted leave to file a second amended answer, which was filed the same day (Rec., p. 49). In this amended answer the defendant claims over-payments by him under the contract of June 24, 1879, of $16,538.93, for which amount he claims judgment with interest from August 1, 1880. (Rec., p. 50.)

On May 22, 1886, the plaintiff filed its reply to the second amended answer (Rec., p. 51), denying all the claims made by the defendant.

On May 23, 1886, the Master Commissioner made his report (Rec., p. 53), going fully into the facts of the case and applying the law as declared by the court and awarding the plaintiff the sum of $230.74, with interest from the 1st day of August, 1880, and costs of suit.

Both plaintiff and defendant excepted to the findings of the Master Commissioner (Rec., pp. 66 and 67).

On May 10, 1889 (Rec., p. 68), the court passed upon the exceptions and reconsidered the questions of law submitted by the Commissioner, reaffirming all the answers given except as to question four (4), and in reference to the fourth question of law declaring that former answer was wrong and that the true answer is—

"That excepting contracts within the designation 'present trade and orders' which the contract of

> June 24, 1879, requires him to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract were not bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but that they were entitled to the market price at the date of the actual sale of said coal by them to Shipman, less his 'fair proportion' of any advance in the price, as specified in the contract of June 24, 1879."

On the 13th day of December, A. D. 1889 (Rec., p. 70), the Commissioner filed his supplemental report, applying the interpretation of the contract given by the court to the facts as found, and stated the amount due the plaintiff on December 3, 1889, to be $9,282.81, and on December 14, 1889 (Rec., p. 73), the report was approved and confirmed, and it was ordered that the findings of the master stand as the findings of the court; and judgment was entered for the said amount in favor of plaintiff and against the defendant, and the sum of $8,204.65, with interest from April 1, 1881, was ordered to be paid into the clerk's office, by The Columbus and Hocking Valley Railroad Company, to be applied to the judgment in favor of plaintiff, &c.

The case comes here on exceptions to the findings of the Commissioner and interpretation placed upon the contracts by the court, the assignment of errors being set forth at page 95 of Record.

Points.

I.

The first ground of exception is to the answer of the court to the second interrogatory propounded to it by the Commissioner.

The question is (Rec., p. 47):

> "Is the written contract of June 24th, 1879, several as between Shipman and each of the other parties to it, or is it a joint contract on the part of the other three parties?"

To this the court replied (Rec., p. 47):

> "Testing the question by the nature of the interest of the parties who contracted with Shipman, the contract should be held to be several, and it is so construed by the court."

This construction placed by the court is undoubtedly correct.

An examination of the contract of June 24, 1879 (Rec., p. 40), shows that the acts to be done on the part of parties thereto are clearly several in character. The defendant Shipman on his part agrees to represent the entire interest of the "other three parties." The words used, "*other three*," show conclusively that they, the companies, are to be considered, with reference to the contract, not jointly as "the other parties," but separated and separately, as the other "*three parties.*" Further, he is to take the coal, contracted for, from them in "equal quantities," which they agree to furnish, thereby creating a several liability on the part of each of the three proposed consignors to furnish an "equal" portion of the merchandise required, and not a joint liability on the part of each to furnish the whole amount, or a reciprocal duty on his part to respond to either of them for more than the price for the quantity by each furnished. He stipulated—

> "to pay them for their coal by the 20th of the month next after each separate month's delivery to him at the mines of said other three parties."

Can anything be clearer than that each of the three parties contracting with Shipman is only to be responsible

to furnish the out-put from its own mine, and that Shipman is to be liable to pay only for such out-put furnished. The interests of the parties as between themselves are shown by the face of the paper to be several and separate, and clearly preclude the idea that they are contracting with Shipman as partners or as parties possessed of joint interests—each company contracting only with reference to an equal and separate quantity. As the court below says:

> "Testing the question by the nature of the interest of the parties who contracted with Shipman, the contract should be held to be several."

Has not the defendant estopped himself from claiming that the contract is joint, having expressly agreed that each company is to furnish, and that he is to receive from it, coal in "equal quantities," and not the whole from each? In Hall *vs.* Leigh et al., 8 Cranch, 50, this court held that even where two joint owners of merchandise consigned it to a merchant for sale, and informed him that each owned one-half, and gave separate instructions, each for his own moiety, one of the consignors could maintain a separate action against the consignee for a violation of his separate instructions, and that the defendant by recognizing the fact of the ownership of each to but a portion of the property, and having contracted with each with reference to such portion, was precluded from making the objection that suit could be maintained only by joint action.

In the present case the defendant contracts with each of the consignors with reference to a portion only of the coal to be furnished, thereby admitting and recognizing the several interests of the respective parties contracting with him. In event of failure to supply such "equal quantity" by one of the parties, but full compliance on part of the others, would it be contended seriously that Shipman would have a cause of action against all the parties jointly because

of such default on the part of one? Reversing the case: Should Shipman have fully settled with the other parties according to the terms of the contract, for the coal by them respectively furnished to him, could it be claimed that the suit for recovery by the Straitsville Central Mining Company for the price of the coal by it furnished, must be brought jointly with the other parties notwithstanding settlement with them? Parsons on Contracts, Vol. 1, page 11 (7th Ed.), says:

> "Whether the liability incurred is joint or several, or such that it is either joint or several, at the election of the other contracting parties, depends upon the terms of the contract, if they are expressed; and when they are not expressed, upon the intention of the parties as gathered from all the circumstances."

We respectfully submit that tested by this rule "all the circumstances" of the present case show the contract involved to be a several one, as declared by the court.

II.

The second ground for exception is alleged to be—

> "That the Hon. Richard A. Harrison, referee, erred in his conclusion that Mr. Shipman, the defendant below, was not entitled to credit for any portion of the increased price above seventy cents for lump coal, and twenty-five cents for nut coal, not required by him to fill outstanding time contracts theretofore made by him;"

that is, that Shipman was not entitled to credit for any portion of the increased price above the sums designated, upon coal promised for contracts made by him after June 24, 1879.

Turning again to the contract the conclusion reached

by the commissioner seems inevitable. It provides—

> "that he will turn in all *his present trade and orders* on their coal at the price of seventy cents per ton at the mines."

It will be borne in mind that there had been a previous arrangement between The Straitsville Central Mining Company and Shipman—under contract dated May 28, 1879—for the delivery of coal by the former to the latter at prices and at places entirely different from those declared by the contract of June 24, 1879.

Under this agreement certain orders had been given to, and received by Shipman. The terms of the contract of June 24, 1879, therefore, was intended to cover and provide for any such orders, the sums designated having, we may presume, been arrived at, and accepted, as the equitable prices in view of the changed conditions of delivery "at the mines" instead of "by boat" from various points and "in cars," &c. Nothing in the contract tends to suggest that the figures named were to prevail during the balance of the time, or to apply to after-secured contracts, and there is no contention that up to the execution of the contract of June 24, 1879, the Straitsville Central Mining Company had not delivered its coal at the prices designated in the contract of May 28, 1879, nor is there any evidence to show that the defendant Shipman during the period from October, 1879, when the last contract was entered into by Shipman in his trade, antedating the execution of the contract of May 28, 1879, claimed an over charge except in the one item named in the findings of fact on page 45 of the Record, of $166.55, being an over charge claimed and allowed of five cents per ton as of August, 1879. There is nothing to show that this item did not refer to an order included in those embraced by the May contract as Shipman's "present trade and orders," and from the fact that no other objections appear of record, and from the fact that

the defendant has, according to his own showing, paid and advanced to the plaintiff $16,538.93 without murmur or protest, in compliance with the terms of the contract of June 24, 1879, as they construed it, would tend strongly to show the true intent of the terms of the contract as agreed upon, and would lead to the well-founded suspicion that the interpretation now sought was an afterthought born of a desire to obviate the necessity of paying a justly incurred indebtedness.

III.

The third exception is to the finding of the referee—

> "that to the extent of one-third of the coal required by Shipman to fill his contracts the plaintiff must be limited to 70 cents for lump coal and 25 cents for nut coal at the mines, and for the excess so furnished by plaintiff to said Shipman after October 1st, 1879, over and above the one-third of the quantities required by him to fill said contracts, the plaintiff is entitled to charge and receive the current market prices from time to time when said coal was delivered, to-wit: the prices charged in plaintiff's account.

If the construction placed upon the contract by the lower court be correct the above finding is inevitable. If the plaintiff was only required, by the terms of its contracts with Shipman to supply one-third of the coal necessary to fill contracts made by defendant, but exceeded his requirements, at request of defendant, and went beyond what was demandable by the terms of his contract, he was undoubtedly entitled to payment for such excess over the said one-third, at the current market prices charged. This seems too clear to need discussion, being a proposition establishing its own correctness by the bare statement thereof.

IV AND V.

The fourth and fifth exceptions may be considered together. They are to the reversal by the court of its first answer to the fourth question of law and to the amended or substituted answer given.

Under date October 12th, 1885 (Record p. 48) the court answered to the fourth question of law propounded by the commissioner, that under the contract of June 24th, 1879, the three companies were bound to furnish coal to fill contracts made by Shipman for future delivery at the market price of coal at Detroit at the time he made such contracts, and not at the market price at the date of delivery of such coal by the companies to Shipman, from time to time during the existence of such contract. Subsequently on May 10th, 1889, the court reached the conclusion (Rec., p. 68) that the above ruling and answer was erroneous and declared the true answer to be that—

> "excepting contracts within the designation 'present trade and orders' which the contract of June 24th, 1879, requires him to turn in at the price of seventy cents per ton at the mines, the three companies named in said contract were not bound to furnish Shipman coal to fill contracts made by him for future delivery at the market price of coal at Detroit at the time when Shipman made such contracts, but that they were entitled to the market price at the date of the actual sale of said coal by them to Shipman less his 'fair proportion' of any advance in the price as specified in the contract of June 24th, 1879."

The reason given by the learned judges for their change of view will recommend itself, and we quote (Rec., p. 68):

> "The error of the court resulted from the treating of the contract of June 24th, 1879, as a contract of agency in the nature of a *del credere* commission. That it was not such a contract is clear from the

> fact, that, while Shipman was to pay for the coal the price fixed by the contract, he was at liberty to sell at his own price and for his account, and 'if a consignee (?) at liberty according to the contract between him and his consignor, to sell at any price he likes and receive payment at any time he likes, but is to be bound, if he sells the goods, to pay the consignor for them at a fixed price, and at a fixed time, in my opinion, whatever the parties may think, their relation is not that of principal and agent' (Lord Justice Mellish in Ex-parte White, L. Rep., 6 Ch. 403). The stipulation in the contract of June 24th, 1879, that Shipman would labor to improve the market price of coal, giving to the mining companies the advantage of whatever improvement might be made in the market, asking no greater part of such increase himself then should be his fair proportion thereof, is altogether consistent with the construction above given. The language of the contract is vague and doubtful and its meaning obscure, but we are clear that the provision above, substantially quoted from the contract, does not constitute an agency, although it does entitle Shipman to an abatement of any advance in the market price of coal which will give him his 'fair porportion thereof,' whatever that may be."

We add nothing to the comment of the court as above, deeming it a full and complete answer to the exceptions.

VI.

The sixth exception is that the referee—

> "erred in his findings and conclusion that the defendant, Ozias W. Shipman, is entitled to his 'fair proportion' of the increased market price of lump coal only, and that the said defendant's 'fair proportion' of the increased market price of nut coal is excluded and denied him."

It is submitted that the above referred to finding is correct. The "Second or Supplemental Report" of the Master Commissioner on page 87 of the Record (at page 88) give the reasons for his findings as set out in this exception. The court had held that the defendant was entitled in settlement of accounts to an abatement to the extent of such "fair proportion" from the improved market price of so much of the coal delivered by the plaintiff to the defendant as is equal to the one-third of the coal required by him to fill his contracts for the delivery of the plaintiff's coal to third persons, and for the purpose of having that "fair proportion" ascertained, the Commissioner took additional testimony. This resulted in finding that the only contracts made by Shipman for future delivery of coal which fall within the designation of the phrase "present trade and orders" as contained in the contract of June 24, 1879, were his contract with the Fulton Iron and Engine Works, and The Detroit Car Spring Company. The Commissioner further finds that the market prices of coal, lump and nut, from time to time, were the prices charged in the plaintiff's account. He determined that Shipman's "fair proportion" of the increased market price of coal was one-half of the net increase in the market price of lump coal at the plaintiff's mine, over and above what the market price was at the date of the said contract of June 24, 1879. And the reasoning of the Commissioner is fair and logical. He says:

> "The stipulation in that contract as to Shipman's 'fair proportion' seems to relate only to an increase in the price of the coal of the kind mentioned in the preceding stipulation in the contract relating to Shipman's then 'present trade and orders'—that is to say lump coal."

The contract in terms refers exclusively to orders of soft coal and the defendant's only contracts with reference to

such, and the Commissioner applies this interpretation to the statement of account as shown on page 89 of the Record.

It is submitted that no error exists in thus finding, and that this exception must fail.

VII, VIII, IX, X.

The findings complained of in the seventh, eighth, ninth and tenth exceptions must naturally follow the application of the law as laid down by the court to the findings of fact as reached by the Commissioner, and are merely matters of computation. It is respectfully submitted that these exceptions are untenable.

XI, XII, XIII.

The eleventh, twelfth and thirteenth exceptions are merely a reiteration of the sixth, with the charge of error shifted from the Commissioner to the court, and is, like the sixth, clearly untenable after a fair interpretation of the language of the contract of June 24, 1879, and is fully met, we submit, by our answer to that exception.

XIV AND XV.

The findings excepted to in the fourteenth and fifteenth exceptions are merely matters of computation resulting from the facts and law as applied by the Commissioner. Assuming the preceding exceptions to be untenable, no error was committed by the court in the holding complained of.

XVI AND XVII.

The sixteenth and seventeenth exceptions are sufficiently considered in the answers to the former exceptions, and we think are fully met by such answers.

XVIII.

In answer to the eighteenth exception we submit that the whole record of the case shows a careful and comprehensive examination and consideration of the case both by the Commissioner appointed for that purpose, and by the court below in passing upon his findings. Every matter of defense presented by the appellant was carefully considered and fully weighed. The decision and result reached are fully borne out by the facts and law of the case and it is respectfully submitted, that no other result could legally and equitably have been arrived at. It does seem a most remarkable defense. For months the defendant, without protest on his part, with full knowledge of the language of the contract of June 24, 1879, continues to pay the various sums claimed by the plaintiff, clearly showing his understanding and meaning of the contract and when a final accounting is claimed, raises the preposterous claim that he has paid thousands of dollars more than he should have paid, and more than it was intended by his contracts he was to pay. The acts of the parties, should there be any doubt as to the meaning of their understanding, throw a light upon the intention that should dispell any such question.

This cause has already been before this court on a motion to dismiss, which was denied. In the brief filed by counsel for plaintiff in error in answer to the motion, the following clause appears:

> "I may add that on the first hearing of this case the finding was in favor of my client to the amount of thirteen thousand dollars.

How counsel fell into such error is beyond our conception, as no such finding appears of record. In both of the reports made by the Commissioner he finds for the plaintiff, the amount only being changed, resulting from the corrected

interpretation of the law of the case as given by the court. This is not referred to in any spirit of adverse criticism, as we feel assured that the erroneous assertion was the result of a misapprehension of the facts of the case. We merely refer to it in order to remove any mistaken impression that may have been created upon the mind of the court by the statement referred to.

It is respectfully submitted that no error was committed below, and that the judgment should be affirmed.

J. HOLDSWORTH GORDON,
Counsel for The Straitsville Central Mining Co.

APPEAL FOR
JAMES H. McKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 306.

OZIAS W. SHIPMAN, PLAINTIFF IN ERROR.

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY.

SUPPLEMENTAL BRIEF.

J. HOLDSWORTH GORDON,

Counsel for The Straitsville Central Mining Co.

Law Reporter Print

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No. 306.

OZIAS W. SHIPMAN, PLAINTIFF IN ERROR.

vs.

THE STRAITSVILLE CENTRAL MINING COMPANY.

SUPPLEMENTAL BRIEF.

Points.

I.

It is not believed that this cause is reviewable, under a correct interpretation of the Statutes, and decisions of this court.

Sections 649, U. S. Revised Statutes, provides that—

> "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as a verdict of a jury."

The cause was, in the circuit court, referred to a master commissioner by the following order (Record, 44):

> "On motion made by the defendant's attorney, and consented to by the plaintiff's attorney, it is now ordered by the court that this cause and the issue therein be,

> and the same are hereby, referred for trial to Hon Richard A. Harrison, a master commissioner of this court, who is hereby directed to report the testimony, with his findings of fact and of law, separately stated, to this court without unnecessary delay."

As will be observed there is no compliance with the strict letter of the requirements of the statute, so far as the filing of a "written stipulation" is concerned. Nor is there anything in the record of the cause as here presented to intimate that such stipulation was made or filed. The serious character of this omission is appreciated by counsel, who endeavors to meet the objection by the claim, that entry made in the journal of the court by the clerk, by agreement of counsel, satisfies the requirement of the statute.

We hardly think this proposition will be accepted by the court as sound, however specious the argument may appear.

In Kearney *vs.* Case, 12 Wall., 275, this court held that under the Act of 1865 there could be no review of the ruling of the court unless the record showed that a written stipulation had been signed and filed with the clerk, and affirmed the judgment of the circuit court in that case, because the steps necessary to secure the right of review of the findings of the court had not been taken, in that the record disclosed no stipulation for waiver of jury as provided by the statute. It had formerly been held by this court in Flanders *vs.* Tweed, 9 Wall., 425, that no review of the decision of the court below could be had of any ruling at the trial, where the parties had consented to accept the court, instead of a jury, to decide issues of fact. The Act of 1865 was intended to obviate this difficulty, and hence the provision above quoted, enabling parties by written stipulations to waive a jury trial, and in conjunction with the provisions of Section 700 of the Revised Statutes of the United States, securing a review by this court in such cases, upon writ of error or appeal.

In the above referred to cause of Kearney *vs.* Case, the court says, Mr. Justice Miller delivering the opinion (282):

> "As stated in the case already referred to, of Flanders *vs.* Tweed, the main purpose of the Act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the idea that in such cases the court did not sit as a court of law but as *quasi* arbitrators. To remove this difficulty, the statute provided a mode by which the parties who agreed to waive a jury should have the benefit of a writ of error to the rulings of the court on questions of law. The language of the section is that the stipulation may be *filed with the clerk of the court*, which is undoubtedly designed to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury trial unexpectedly. . . . We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. This we understand to be the effect of the opinion in Flanders *vs.* Tweed."

The language of the court just quoted seems to negative the proposition that this cause is reviewable here, assuming

the submission to the commissioner and the subsequent affirmance of his report by the court, to be equivalent to a submission to and trial by the court.

II.

But it is contended that as Section 914 of the Revised Statutes provides that trials at law in the circuit courts shall conform, as near as may be, to the pleadings, and forms and modes of proceeding existing at the time in like causes, in the courts of record of the State within which such circuit courts are held, and as under the practice in Ohio referees are made use of extensively, Congress must have intended that such proceedings should be reviewed in this court, just as similar proceedings would be reviewed in error in the State court.

In Boogher *vs.* Insurance Co., 103 U. S., 90, Mr. Justice Waite said (95):

> "It is, to say the least, doubtful whether cases tried in the circuit courts by a referee, in States where such practice exists, can be reviewed here, while, since the Act of 1872, Ch. 255 (17 Stat. 196, now Sec. 914 Rev. Stat.) the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held, the review of a case in this court is regulated by the Acts of Congress and not by the laws of the State."

No provision is incorporated in the Act of 1872, enlarging the existing modes of subjecting cases to review in this court, and as observed by the court in the above case (96):

> "Any allusion to a review here seems to have been studiously avoided. The Act of 1865 was not repealed. On the contrary, that act, as well as the one of

> 1872, was brought into the Revised Statutes, and it is now, as Section 700, the only statute which provides for a review here of cases where an issue of fact in a civil cause has been tried in the circuit court otherwise than by a jury."

It being conceded that the Act of 1872 does not enlarge the modes of appeal, it would follow that the provisions of the Act of 1865 must prevail, and that only upon compliance with said provisions can the litigants avail themselves of the right therein given of review by the court.

It is submitted that there has been an utter failure to comply with the requirements of that statute, and that the plaintiff in error here has not placed himself in a position to invoke the review of the cause by this court.

J. HOLDSWORTH GORDON,
Counsel for The Straitsville Central Mining Co.

No. 271
Russellville
to
Maxwell
Land Grant Co
p. 64a

Township 33 South. Range 68 West.

SCHOOL SECTION

Sections 16 and 36

Meanders of Arkansas River

Meanders of Huerfano River

Meanders of Creek

Sections 6, 5, 4, 3, 2, 1
Sections 7, 8, 9, 10, 11, 12
Sections 18, 17, 16, 15, 14, 13
Sections 19, 20, 21, 22, 23, 24
Sections 30, 29, 28, 27, 26, 25
Sections 31, 32, 33, 34, 35, 36

Surveys dependent upon Arkansas Line

By whom surveyed: A. T. Sheldon, A. W. Archibald, J. H. Maly, W. A. Schuldes

Date of Contract: July 24 1869, Oct 24 1871

Date Surveyed: Mr. Ch. Line 1869, Ex. 13, 42 Dec 1871

The above map of Township No. 33 South of Range No. 68 west of the 6th Principal Meridian in Colorado is strictly conformable to the field notes of the survey thereof on file in this office and is hereby approved and accepted.

Surveyor Generals Office
Denver C.T. February 24, 1872

William H. Lessig
Surveyor General

Received U. S. Land Office Pueblo Colorado March 4th 1872

Irving W. Stanton
Register

U. S. Land Office, Pueblo, Colorado } ss.

I F. E. Baldwin, do hereby certify that the foregoing has been compared with the Original and found to be a true and exact copy.

F. E. Baldwin, Register.
April 3, 1890.

SCALE—One inch to one-half mile.

Magnetic Variation.....189...

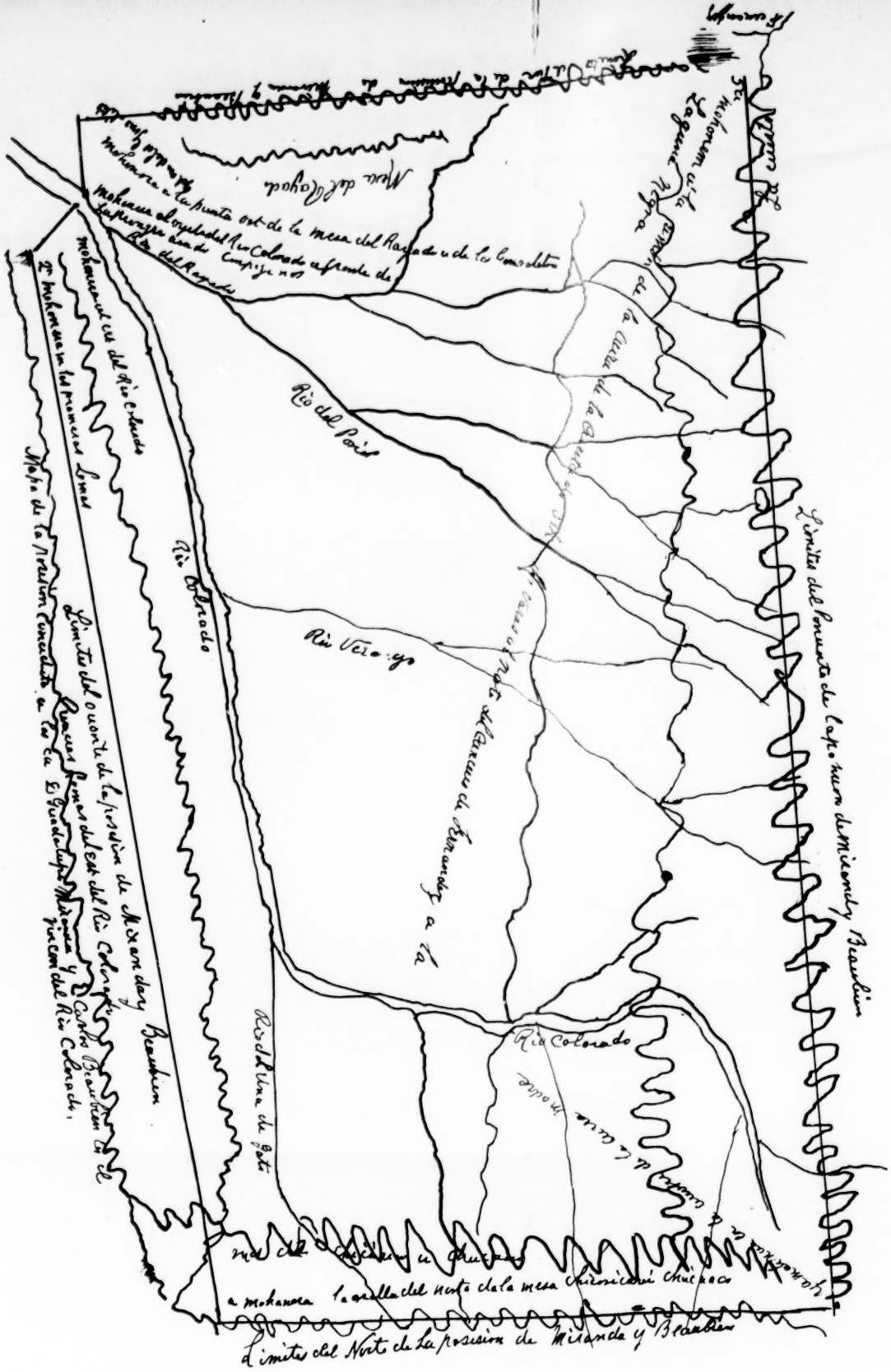
Date of Plat

KING & BETTS,
PUEBLO, COLO.

REFERENCES:

..... Entered Land.
..... Homestead Application.
..... Pre-emption Filing.
..... Timber Culture Claim.
..... Coal Filing.
..... Coal Entry.

Lands not otherwise marked are vacant U.S. Lands.



Territory of New Mexico }
County of Colfax } ss:

I the undersigned Clerk of the Probate Court and Ex Officio Recorder in and for said County in the Territory aforesaid, do hereby certify that the above is a true copy of a map of the limits of the grant to Charles Beaubien and Gaudalupe Miranda, recorded in this Office on the first day of April A. D. 1873, and Recorded in Deed Book A at Page 325; and that the same was recorded by John Lee the then recorder of Colfax County New Mexico, as one of the muniments of title to said grant to said Charles Beaubien and Gaudalupe Miranda.

Witness my hand and official Seal at Springer the County seat of Colfax County N. Mx. this 31st day of March A. D. 1880,

(Seal of the Probate Court Colfax Co N. Mx.)

W M Salazar
Probate Clerk & Ex Officio
Recorder Colfax Co. N. Mx

No 321
Russell Neal
vs
Maxwell Land
grant Co
} p 123